

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS. CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8

9 Transcript of Motion to Suppress and James  
10 Hearing Proceedings before The Honorable James O.  
11 Browning, United States District Judge, Las Cruces,  
Dona County, New Mexico, commencing on January 26,  
2018.

12

13 For the Government: Ms. Maria Armijo; Mr. Randy  
Castellano; Mr. Matthew Beck

14

15 For the Defendants: Mr. Brock Benjamin; Ms. Cori  
Harbour-Valdez; Mr. Robert Cooper; Mr. Jeff Lahann;  
16 Mr. John Granberg; Mr. Billy Blackburn; Mr. Ryan  
Villa; Ms. Amy Jacks; Mr. Richard Jewkes; Mr. Marc  
Lowry; Ms. Theresa Duncan; Ms. Carey Bhalla; Mr.  
17 William Maynard; Mr. Donovan Roberts; Ms. Lisa  
Torraco; Ms. Angela Arellanes; Mr. Jerry Walz

18

19 For the Defendants (Via telephone): Ms. Justine  
Fox-Young; Mr. Pat Burke; Mr. James Castle; Mr.  
20 Richard Sindel

21

Also present: Mr. Gary Mitchell

22

23

24

25

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1                   THE COURT: All right. Good morning  
2 everyone. I appreciate everyone making themselves  
3 available to me this morning.

4                   The Court will call the United States of  
5 America versus Angel DeLeon, et al., Criminal Matter  
6 No. 15-CR-4268-JB.

7                   If counsel will enter their appearances for  
8 the Government.

9                   MS. ARMIJO: Good morning, Your Honor.  
10 Maria Armijo, Randy Castellano, and Matthew Beck on  
11 behalf of the United States.

12                  THE COURT: All right. Ms. Armijo, Mr.  
13 Castellano, and Mr. Beck, good morning to you.

14                  And for Defendant Joe Lawrence Gallegos.

15                  MR. BENJAMIN: Good morning, Your Honor.  
16 Brock Benjamin, on behalf of Mr. Gallegos. And I  
17 believe Mr. Sindel is on the phone.

18                  MR. SINDEL: Good morning, Your Honor.  
19 This is Richard Sindel.

20                  THE COURT: All right. Mr. Benjamin, Mr.  
21 Sindel, Mr. Gallegos, good morning to you.

22                  For Defendant Edward Troup.

23                  MS. HARBOUR-VALDEZ: Good morning, Your  
24 Honor. Cori Harbour-Valdez. And Pat Burke is  
25 joining us by phone.

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1 MR. BURKE: Good morning, Your Honor. Pat  
2 Burke, also appearing for Edward Troup.

3 THE COURT: All right. Ms. Harbour-Valdez,  
4 Mr. Burke, Mr. Troup, good morning to you.

5 THE DEFENDANT: Good morning, sir.

6 THE COURT: For Defendant Billy Garcia.

7 MR. COOPER: Good morning, Your Honor. Bob  
8 Cooper on behalf of Mr. Garcia, who is present this  
9 morning. And I believe Mr. Castle was going to join  
10 us on the telephone.

11 THE COURT: All right. Mr. Cooper, Mr.  
12 Garcia, good morning to you.

13 Mr. Castle, are you there?

14 MR. CASTL: Yes, I am, Your Honor. Jim  
15 Castle on behalf of Mr. Garcia, by phone.

16 THE COURT: All right. Good morning to  
17 you.

18 And for Defendant Allen Patterson.

19 MR. LAHANN: Good morning, Your Honor.  
20 Jeff Lahann on behalf of Mr. Patterson.

21 THE COURT: All right. Mr. Lahann,  
22 Mr. Patterson, good morning to you.

23 And, let's see, for Defendant Christopher  
24 Chavez.

25 MR. GRANBERG: Good morning, Your Honor.

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1 John Granberg for Mr. Christopher Chavez.

2 THE COURT: All right. Mr. Granberg,

3 Mr. Chavez, good morning to you.

4 THE DEFENDANT: Good morning.

5 THE COURT: And for Defendant Arturo  
6 Arnulfo Garcia.

7 MR. BLACKBURN: Billy Blackburn on behalf  
8 of Mr. Garcia. He's present, Your Honor.

9 THE COURT: All right. Mr. Blackburn, good  
10 morning to you. Mr. Garcia, good morning to you.

11 THE DEFENDANT: Good morning.

12 THE COURT: And for Daniel Sanchez.

13 MS. JACKS: Good morning, Your Honor. Amy  
14 Jacks and Richard Jewkes for Mr. Sanchez.

15 THE COURT: All right. Ms. Jacks, Mr.  
16 Jewkes, Mr. Sanchez, good morning to you.

17 And for Defendant Anthony Ray Baca.

18 MS. DUNCAN: Good morning, Your Honor.

19 Theresa Duncan and Marc Lowry on behalf of Mr. Baca.

20 THE COURT: All right. Ms. Duncan,  
21 Mr. Lowry, Mr. Baca, good morning to you.

22 THE DEFENDANT: Good morning.

23 THE COURT: And, let's see, Mr. Garcia is  
24 not here.

25 So for Defendant Carlos Herrera?

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1 MS. BHALLA: Good morning, Your Honor.

2 Carey Bhalla and Bill Maynard for Mr. Herrera.

3 THE COURT: All right. Ms. Bhalla,

4 Mr. Maynard, Mr. Herrera, good morning to you.

5 THE DEFENDANT: Good morning.

6 THE COURT: For Defendant Rudy Perez.

7 MR. VILLA: Good morning, Your Honor. Ryan  
8 Villa on behalf of Mr. Perez. And on the phone is  
9 Ms. Fox-Young.

10 THE COURT: All right. Mr. Villa, Mr.  
11 Perez, good morning to you.

12 Ms. Fox-Young, are you there?

13 MS. FOX-YOUNG: Good morning, Your Honor.  
14 This is Justine Fox-Young for Mr. Perez.

15 THE COURT: All right. Good morning to  
16 you, Ms. Fox-Young.

17 And for Defendant Andrew Gallegos.

18 MR. ROBERTS: Good morning, Your Honor.  
19 Donovan Roberts for Andrew Gallegos, with Lisa  
20 Torraco, with counsel all present and accounted for.

21 THE COURT: All right. Mr. Roberts, Ms.  
22 Torraco, good morning to you. Mr. Gallegos, good  
23 morning to you.

24 THE DEFENDANT: Good morning.

25 THE COURT: And for Defendant Shauna

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1 Gutierrez.

2 MS. ARELLANES: Angela Arellanes for Ms.  
3 Gutierrez, who is present.

4 THE COURT: All right. Ms. Arellanes, Ms.  
5 Gutierrez, good morning to you.

6 THE DEFENDANT: Good morning.

7 THE COURT: And for Defendant Brandy  
8 Rodriguez.

9 MR. WALZ: Good morning, Your Honor. Jerry  
10 Walz for Ms. Rodriguez. And she's present.

11 THE COURT: All right. Mr. Walz, Ms.  
12 Rodriguez, good morning to you.

13 Anybody else on the phone that hasn't  
14 entered an appearance? Anyone in the courtroom that  
15 we haven't gotten to?

16 All right. It looks like the first motion,  
17 to me, is the motion regarding shackling. So shall  
18 we take that up, Mr. Villa? I think you took the  
19 lead on it. I know that you filed something, I  
20 think, this morning, and I haven't had a chance --

21 THE CLERK: Yesterday.

22 THE COURT: Yesterday. But I think it may  
23 have caught us when we were traveling. So I haven't  
24 had a chance to look at it. But I will take a look  
25 at it and pull it up while you're arguing.

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1 MS. ARMIJO: Your Honor, may we take up a  
2 brief issue before we get to this matter?

3 THE COURT: All right. What do you have?

4 MS. ARMIJO: There was a motion to continue  
5 that was filed last night. I don't want to get into  
6 the merits of it or anything else. I'm just moving  
7 the Court to seal it. There are attachments that  
8 reveal confidential informants that were pursuant to  
9 a protective order. I think it's a violation of the  
10 protective order to file that for the public. It  
11 outs all of our informants. And the letters  
12 themselves are part of a protective order, not even  
13 allowed to go onto the tablets. So by filing it  
14 publicly, it allows the defendants and the public  
15 access to something that we clearly put in a  
16 protective order and is covered by a protective  
17 order. So I would ask for immediate sealing of that  
18 motion.

19 MS. JACKS: And I join. I'm the one that  
20 filed it. I made a mistake. Ms. Sirignano had done  
21 the motion. And when Mr. Garcia pled, it did not get  
22 filed. I filed it last night, and did not read the  
23 attachment. And I would ask to seal it as well.

24 THE COURT: All right. Anybody object to  
25 sealing the motion to continue? Not hearing any, it

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1 will be removed.

2 I'm going to pass out to you a chart. This  
3 is not a complete chart. It is a partial one. In  
4 about two hours you're going to have a more complete  
5 chart. But this is going in the opinion that I've  
6 been working on about the James statements and the  
7 James hearing that we had, co-conspirator statements.  
8 So it's not complete and it's not finished, and it  
9 will be much longer here in a couple of hours, as we  
10 pull some stuff together.

11 I'd ask the United States to send that to  
12 Mr. Braun; get that over to him so that he can take a  
13 look at it, and maybe we'll be a little bit better  
14 prepared when we get to those issues a little bit  
15 later.

16 All right. Mr. Villa?

17 MR. VILLA: Thank you, Judge.

18 What was filed yesterday is Document 1700.  
19 It's a response. Essentially, it's a response to  
20 Document 1678, which is basically the email from the  
21 United States Marshal Service. And it has some  
22 additional case law in there that I think is  
23 important for the Court to take a look at before it  
24 makes its decision. It's United States v.  
25 Sanchez-Gomez, 859 F.3d 649, from the Ninth Circuit,

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1 just in May of last year, as well as the Tenth  
2 Circuit case I found from 1988, United States v.  
3 Apodaca, 843 F.2d 421. Both of those cases  
4 essentially talk about the limits, I guess, that the  
5 Court has in delegating its decisionmaking to the  
6 United States Marshal Service with respect to the  
7 issues of shackling.

8 The email -- or excuse me, the response  
9 also responds to the email, pointing out essentially  
10 that, with respect to the remaining Trial 1  
11 defendants, that being Mr. Baca, Mr. Perez, Mr.  
12 Sanchez, and Mr. Herrera, the email that's provided  
13 does not give any individualized information as to  
14 any one of those defendants that would suggest that  
15 there is any reason they need to be shackled, such as  
16 a risk that they might present individually.

17 And I think that, you know, while I  
18 appreciate the work of the United States Marshals,  
19 and appreciate the concerns that they have, and the  
20 information that they provided in the email, it  
21 simply is not sufficiently individualized for this  
22 Court to make a decision that shackling is necessary.

23 THE COURT: Looking at the 302s that have  
24 been recently provided to the Court in this batch of  
25 briefing, which they talk about the hit list, and

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1 which Carlos Herrera is one of the people that's at  
2 the very top of the list, it seems to me that's  
3 pretty -- I don't know, that seems to me very  
4 troubling that we're going to have four men together,  
5 where two of the leaders may be having a hit on one  
6 of the other defendants in the courtroom.

7 MR. VILLA: Well, a few things, Your Honor:  
8 That information had come out some time ago. I think  
9 Mr. Davis may have -- I don't remember if he actually  
10 brought it to the attention of the Court, but -- go  
11 ahead, Ms. Bhalla.

12 MS. BHALLA: Thank you.

13 THE COURT: Well, no, I'd like --

14 MR. VILLA: Well, maybe not.

15 THE COURT: I'll run my own courtroom, Mr.  
16 Villa.

17 MR. VILLA: I apologize, Judge. Let me  
18 just say this, this information came out a long time  
19 ago. There was information dating back over a year  
20 about hits. Frankly, when you read the 302s, just  
21 about everybody in the room potentially has a green  
22 light on them.

23 THE COURT: Well, doesn't that in itself  
24 provide the individualized analysis that you're  
25 wanting?

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1                   MR. VILLA: I don't think it does, Your  
2 Honor, for a couple of reasons: One, is the  
3 information is coming from cooperating witnesses, who  
4 I think have inherent problems with their  
5 reliability.

6                   THE COURT: But I mean, you're even saying  
7 that everybody in the room has a green light on them.

8                   MR. VILLA: Based on cooperator  
9 information. And so, to me, the fact that everybody  
10 is saying that --

11                  THE COURT: What about the fact we've had  
12 people bringing shanks into the courtroom while we've  
13 been trying to have hearings?

14                  MR. VILLA: So that's addressed in the  
15 response as well, Your Honor. That is now a  
16 cooperating witness, the one individual I know that  
17 allegedly brought shanks into the courtroom.

18                  THE COURT: Well, but what level of  
19 individual attention? Do I have to find a shank on  
20 Mr. Perez before I can put shackles on him? I mean,  
21 what is the level of individualized analysis that I  
22 need to make here?

23                  MR. VILLA: Well, I certainly think --

24                  THE COURT: Do I have to wait till it  
25 occurs?

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1 MR. VILLA: You don't have to do that, no.

2 THE COURT: Then tell me, given what we've  
3 had here, what more I need to find shackles  
4 appropriate?

5 MR. VILLA: Well, Your Honor, I think it's  
6 not that someone who is now testifying against Mr.  
7 Perez brought shanks to the court. I don't think  
8 that's enough. If there was some information that  
9 perhaps Mr. Perez was going to bring shanks or some  
10 other material to the court, that he's not supposed  
11 to, then I think we need the opportunity to test that  
12 information. But we don't even have that. We don't  
13 have anybody saying Mr. Perez is going to bring a  
14 dangerous weapon to court, or something else, or Mr.  
15 Perez is planning on executing a hit on any one of  
16 the other three co-defendants.

17 We just have a lot of this generalized  
18 information from a lot of different sources that  
19 doesn't come out until they cooperate, until they  
20 have some exchange with the FBI or the United States  
21 Attorney's Office about the benefits they're going to  
22 get for providing information. And we don't know how  
23 it transpired. You know, it's simply not trustworthy  
24 enough that some of these folks that -- you mentioned  
25 Mr. Herrera -- having a green light on them, or as

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1 mentioned in the United States Marshal's email, some  
2 testimony that came out that maybe Mr. Sanchez and  
3 Mr. Baca had a problem with each other.

4 You know, if this information is true --  
5 which we doubt its reliability because of the source,  
6 and because it didn't come out until they decided to  
7 cooperate and got some benefit for that -- it's  
8 belied by what you've seen in the last two-and-a-half  
9 years of this case. You know, if this occurred, it  
10 occurred in some of the information before the  
11 indictment -- some of it occurred during, according  
12 to the cooperators -- but at no time throughout this  
13 case have you seen anything happen in this courtroom.  
14 You haven't got any information, at least that the  
15 defense is aware of, that there was some plans or  
16 movements occurring in the transport, on the way up  
17 in the elevator or during the breaks.

18 THE COURT: Some of these 302s suggested  
19 that they would kill people in transport if they did  
20 not sit at the back of the bus.

21 MR. VILLA: Well, I think one of those may  
22 have come from Mr. Rodriguez, who is one of the  
23 individuals who brought shanks to court, who is now  
24 testifying against all four of the Trial 1  
25 defendants. So I think we have to be skeptical of

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1 his testimony or his statements in the 302, and what  
2 he's saying, and how that came about, and the fact  
3 that he's not just genuinely concerned about  
4 something happening in this courtroom or something  
5 happening to his quote/unquote friends. He's only  
6 providing this information after he's decided to  
7 cooperate and receive the benefits that he's going to  
8 receive from that.

9                   And there isn't any other information to  
10 corroborate what he has said, other than, again, this  
11 generalized statements from other cooperators. If  
12 the United States Marshal said, you know, I went up  
13 to Mr. Perez and said, you know, Do you think someone  
14 is at risk of getting attacked in the transport van,  
15 and he said something, or didn't say something, or  
16 had a strange reaction, or something was found in the  
17 cells or another source, like a transport officer had  
18 some observations that were concerning, some other  
19 evidence besides just words of the cooperators, to  
20 lead this Court to believe that any of that is true,  
21 I think is what is required.

22                   And with respect to Mr. Perez, there isn't  
23 any of that information in any of these 302s. I  
24 recognize what you're saying about Mr. Herrera, and  
25 what the marshals said about Mr. Sanchez and Mr.

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1       Baca. But, again, there is no corroboration for any  
2       of this material. And I think, short of that, there  
3       isn't any other evidence that I've seen or this Court  
4       has seen that would warrant shackling.

5                   So if we're just dealing with the Court's  
6       concerns from some of these 302s, then I think I've  
7       responded to that. There isn't any other information  
8       that the defense is aware of. And so if there is,  
9       I'd ask that we put it on the table this morning.  
10      But there isn't any other information that would lead  
11     to a conclusion that shackling is necessary.

12                  THE COURT: All right. I may let you argue  
13       further. Why don't -- since we have Deputy US  
14       Marshal Mickendrow in the room -- and I think he was  
15       the one who put the report together -- why don't I  
16       let him come to the podium and speak. And then y'all  
17       may have questions y'all want to ask him.

18                  Deputy, good morning.

19                  DEPUTY MICKENDROW: Good morning, Your  
20       Honor.

21                  THE COURT: Do you want to go ahead and  
22       make a record as to why y'all feel that shackles are  
23       necessary in this case? And if you can break it out  
24       by defendant, that would be helpful, I think, to  
25       everyone.

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1 DEPUTY MICKENDROW: Yes, Your Honor. So I  
2 think the first thing that's important to know would  
3 be that the Marshal Service -- one of the Marshal  
4 Service's duties is the -- to ensure the protection  
5 integrity of the Court and all parties within the  
6 courtroom. That includes the defendants. So when  
7 we're considering security measures, we take the  
8 defendants, the risk to the defendants, into  
9 consideration in that decision.

10 What I would say is that I don't believe  
11 the Marshal Service makes the decision, or in this  
12 case, has made the decision, that the shackles are  
13 required. That's a decision of the Court. However,  
14 we do strongly urge the Court to follow the  
15 recommendations of the Marshal Service.

16 And there are several reasons why. We  
17 have, in this case now, four defendants going to  
18 trial that have very lengthy criminal histories. We  
19 pointed that out as one of the notable points.  
20 They're in an organization that is known to be a  
21 violent organization. And that's not something that  
22 we can just disregard.

23 The Marshal Service -- Mr. Villa is right,  
24 the Marshal Service doesn't have to prove beyond all  
25 doubt that Mr. Sanchez and Mr. Baca are looking at

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1 trying to take each other out. All we have to look  
2 at is, is there a probability that that's going to  
3 happen. And there is a great probability. That's  
4 the way these organizations run. Everybody wants to  
5 be the Number 1 man. And so it's understandable that  
6 there would be contention within that organization.

7 Again, we don't need to prove that Mr.  
8 Herrera has a green light on his head. But the facts  
9 that have been presented to us are enough to give us  
10 cause -- or to give us pause, and to say that we need  
11 to take extra security measures in order for the  
12 protection of everyone within the courtroom.

13 I would also point out that -- I believe I  
14 stated this in either the email, or it was a part of  
15 the attachments, that we could find no case in which  
16 any case was overturned due to security restraints  
17 used by the Marshal Service in any trial. I had --  
18 and this isn't me speaking regarding this; this is my  
19 Office of General Counsel providing this information.  
20 I would not propose to be a legal matter expert in  
21 any of this. But what I would say is, when I was  
22 writing up the information to provide to the Court, I  
23 did refer to who I believed to be the legal matter  
24 experts on this issue, and that was my Office of  
25 General Counsel.

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1           It's with all of that in mind that we take  
2        into consideration what is the least restrictive  
3        measure that we should ask for when we made our  
4        presentation to the Court.

5           In addition, we took into consideration  
6        many of the concerns that defense counsel raised.  
7        And I believe one of the concerns was they didn't  
8        want to have 100 deputies in and out of the courtroom  
9        during the trial. And if we don't use leg  
10      restraints, we would have to go to a more restrictive  
11      process, which would include more deputies. And  
12      that's just from a safety perspective. We have our  
13      own policies and procedures that we are required to  
14      follow. And if the leg restraints are not imposed,  
15      then we have to look at alternatives. And the  
16      alternatives, I believe, are more contrary to what  
17      defense counsel would want.

18           So with that, I would just turn it back  
19        over to the Court, and if you have any more specific  
20        questions for me.

21           THE COURT: Let's see if any of the counsel  
22        do.

23           Mr. Villa, do you have any questions that  
24        you want to ask Deputy Mickendrow?

25           MR. VILLA: I'm looking for a microphone.

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1 I guess I'm close enough.

2                   Do you have any specific information that  
3 Mr. Perez presents a threat or has a threat upon him,  
4 such that someone needs be shackled during this  
5 trial, or else he's going to get hurt or he's going  
6 to hurt somebody?

7                   DEPUTY MICKENDROW: Yes.

8                   MR. VILLA: Can you tell me what that is?

9                   DEPUTY MICKENDROW: He's a member of the  
10 SNM Gang. He provided a device that he was given to  
11 be allowed to be used in the processing and making of  
12 weapons. I don't, like you, have to look at proving  
13 that Mr. Perez did this. I look at what is being  
14 stated and who has stated it and the reliability of  
15 their statements. And based on the fact that I'm  
16 receiving that information from other law enforcement  
17 officers who have never had their credibility  
18 questioned, I'm going to err on the side of caution  
19 with that and believe what's going on.

20                  In addition, I look at Mr. Perez' criminal  
21 history, which is quite lengthy. And those facts  
22 alone, even if he was the only defendant in the  
23 courtroom would cause -- would give me pause, and  
24 would cause me to request additional security  
25 measures to be implemented.

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1                   MR. VILLA: Let's talk about his criminal  
2 history. Does he have a specific instance in his  
3 criminal history that leads you to believe he's a  
4 risk inside the courtroom?

5                   DEPUTY MICKENDROW: When I look at criminal  
6 history, I don't look at any one specific instance.  
7 I look at a whole picture. In this case, when I look  
8 at all the defendants' criminal histories, I'm  
9 looking at that whole picture.

10                  As far as one specific instance, I would  
11 have to review his criminal history to be able to  
12 answer that question. But, again, in my opinion, I  
13 don't look at a specific instance per his criminal  
14 history. I look at a whole picture.

15                  MR. VILLA: Well, let's set your opinion  
16 aside for just a second. And I just want to talk  
17 about -- and if you don't have it on the tip of your  
18 mind, that's fine, but something specific that Mr.  
19 Perez has been convicted of, or accused of in his  
20 criminal history that, for instance, was an incident  
21 that happened in court, or attacking of a witness,  
22 attacking of a co-defendant, a law enforcement  
23 officer during court proceedings, threatening a  
24 judge, anything along those lines that you can think  
25 of in Mr. Perez' history?

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1                   DEPUTY MICKENDROW: I can't think of  
2 anything off the tip of my tongue. I'd have to  
3 review his criminal history specifically. But what I  
4 would point out is the individual -- I cited a case  
5 out of Salt Lake City, Utah. That individual had no  
6 incidences in his past in which he acted out in court  
7 either. However, you had a situation there, where  
8 the recommendation of the U.S. Marshals was not  
9 taken.

10                  And we operate on a scale where we take  
11 information that we are trying to gather from  
12 multiple sources. And so my response would be I  
13 don't have any one specific piece of information for  
14 you. But taking the holistic picture, I believe, is  
15 necessary.

16                  And you asked to set my opinion aside. And  
17 I respect that. But in all of this, all we are  
18 providing is our opinion. We provided our opinion to  
19 the Court. The Court ultimately makes the decision.

20                  MR. VILLA: Don't get me wrong, I respect  
21 your opinion. I'm just trying to look at objective  
22 facts.

23                  And so, with that in mind, let me ask about  
24 the conduct of Mr. Perez. Since he's been indicted  
25 in this case, have there been any instances the

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1       United States Marshal is aware of where Mr. Perez  
2       presented a threat, himself, during courtroom  
3       proceedings? And I'm not talking about the fact that  
4       he's a member of -- alleged member of a gang, or that  
5       he's alleged to have provided a piece of material  
6       that is involved in this Molina homicide. I'm  
7       talking about while he's been in court, has he made  
8       threats towards somebody? Has he lunged at someone?  
9       Have you seen anything like that that leads you to  
10      believe he was about to commit an act of violence in  
11      court?

12           DEPUTY MICKENDROW: Yes.

13           MR. VILLA: For Mr. Perez, specifically?

14           DEPUTY MICKENDROW: For Mr. Perez  
15      specifically.

16           MR. VILLA: And when was that?

17           DEPUTY MICKENDROW: That was the incident  
18      with Mr. Garcia, where one of my deputies approached  
19      Mr. Garcia and told him to, in essence, stop trying  
20      to intimidate others. And Mr. Garcia was placed --  
21      hands on were placed on Mr. Garcia. He was removed  
22      from the courtroom. At that time, multiple  
23      defendants got up and started yelling. And Mr. Perez  
24      was one of those defendants. I had to threaten the  
25      court -- sorry, I had to threaten the defendants at

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1       that time that I would take them all out of the court  
2       if they didn't settle down. And it wasn't until  
3       after that that he settled down. So, yes, there has  
4       been incidences in the courtroom where his behavior  
5       would give me pause.

6                    MR. VILLA: So, in that particular  
7       instance, he stood up and yelled in reaction to  
8       Mr. Garcia being removed from the courtroom?

9                    DEPUTY MICKENDROW: He yelled in reaction  
10      to what was occurring with Mr. Garcia; not him being  
11      removed from the courtroom.

12                  MR. VILLA: Did he say something that he  
13      yelled, that you recall?

14                  DEPUTY MICKENDROW: Not that I can recall.  
15      I couldn't recall a specific. I know that he was one  
16      of the individuals that did react.

17                  MR. VILLA: And when he reacted, you told  
18      him to sit down or you're going to remove him from  
19      court?

20                  DEPUTY MICKENDROW: There was multiple  
21      times where I had to tell the defendants to sit down.  
22      It was not once.

23                  MR. VILLA: Mr. Perez specifically?

24                  DEPUTY MICKENDROW: Multiple defendants.

25                  MR. VILLA: How many times did you have to

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1 tell Mr. Perez to sit down or you would remove him?

2 DEPUTY MICKENDROW: In that instance,  
3 you're asking me to refer to one defendant, when I  
4 had multiple defendants causing a disturbance within  
5 the courtroom. And in that case, I wouldn't refer to  
6 one defendant. I would refer to all of them. And so  
7 there was multiple occasions where I had to tell all  
8 of them to sit down, or that I would start removing  
9 them from the courtroom. And, in fact, I believe  
10 there was another defendant that we removed. It was  
11 Mr. Sanchez.

12 MR. VILLA: Mr. Perez did not have to be  
13 removed?

14 DEPUTY MICKENDROW: He did not.  
15 Ultimately, they finally started to comply, and they  
16 did sit down.

17 MR. VILLA: Okay. Other incidents in the  
18 courtroom besides that one?

19 DEPUTY MICKENDROW: Besides that one, I  
20 can't think of any other instances.

21 MR. VILLA: All right. And when you were  
22 responding to my question earlier about the  
23 allegations, you said Mr. Perez provided a piece to  
24 make a weapon, you're talking about the allegations  
25 in this case?

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1 DEPUTY MICKENDROW: Yes, I am.

2 MR. VILLA: You're not talking about a  
3 different incident?

4 DEPUTY MICKENDROW: No.

5 MR. VILLA: I think that's all the  
6 questions I have.

7 THE COURT: All right. Thank you,  
8 Mr. Villa.

9 Ms. Bhalla, Mr. Maynard, do you have  
10 anything you want to ask Deputy Mickendrow?

11 MR. MAYNARD: I don't have any questions,  
12 Your Honor. I would just like --

13 THE COURT: Okay. Let me see if anybody  
14 has any questions, then I'll let you comment.

15 Anybody else have any questions of Deputy Mickendrow.

16 How about the Government? Do you have any  
17 questions?

18 MR. CASTELLANO: I do have some questions  
19 about a shakedown that took place.

20 THE COURT: Let me ask y'all while y'all  
21 are both there: My understanding is that, of the  
22 five defendants -- I know there is only four today --  
23 but of the five defendants who are going to trial,  
24 three of them had either escape charges or escape  
25 convictions. Can you tell me which three? And are

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1       they two of the remaining four, or are they three of  
2       the four?

3                    MR. CASTELLANO: What I have is a quick  
4       reference, Your Honor, is the notice of bad acts we  
5       gave to each of the defendants. And I think the  
6       Court could take judicial notice of those letters.  
7       They were made part of the docket when defendants  
8       filed motions to exclude any of the bad acts. So  
9       those are already something the Court can take  
10      judicial notice of.

11                  Let's see, in 1992, Mr. Sanchez committed  
12      murder in the first degree. In 1994, he incited a  
13      riot at the inmate recreation yard. He assaulted an  
14      inmate in 1994, and a correctional officer in 1994,  
15      as well as '95, in '95 and '96.

16                  In '97, there was an assault of a  
17      correctional officer and threatened another inmate.  
18      In '97, he threatened another correctional officer.  
19      He threatened --

20                  THE COURT: These are all convictions?

21                  MR. CASTELLANO: This is jail misconduct.

22                  THE COURT: Jail misconduct.

23                  MR. CASTELLANO: These are acts committed  
24      within the Corrections Department.

25                  In 1999, in the Corrections Department, he

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1 threatened a correctional officer. In '99, he  
2 attempted to flood his cell and incite a disturbance  
3 among the other inmates. In '99, he assaulted  
4 another correctional officer -- twice in 1999.

5 In 2003, he possessed a homemade weapon and  
6 attempted to conceal it.

7 He received drugs in the facility that were  
8 sent in by Christopher Garcia. Then, in 2005, he  
9 attempted to murder a rival gang member, and stabbed  
10 him several times. And also a correctional officer  
11 was caught up in that conduct, and was also, I  
12 believe, stabbed.

13 In 2010, he was appointed to the tabla,  
14 making him a leader and a shot caller. In 2010, he  
15 assaulted a correctional officer in the Corrections  
16 Department.

17 In 2012, he threatened a correctional  
18 officer.

19 In 2013, while in custody, he conspired  
20 with another gang member to kill Anthony Ray Baca for  
21 poor leadership decisions.

22 Mr. Baca has also, at least one time,  
23 conspired to murder Mr. Sanchez.

24 And then, of course, in 2014, the charged  
25 conduct is that he called for the hit on Mr. Molina.

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1                 Regarding Mr. Baca -- I'm going to give  
2 necessary facts for the purpose of making  
3 individualized finding as to each of these  
4 defendants, because I think this is required.

5                 So, in 1982, Mr. Baca committed voluntary  
6 manslaughter. In 1982, he committed battery on a  
7 peace officer.

8                 In '87, he conspired to receive stolen  
9 property.

10                 I'll try to focus on the more aggravating  
11 or violent actions. In 1988, he committed armed  
12 burglary, aggravated burglary, and aggravated  
13 battery.

14                 In 1989, while in the custody of the  
15 Corrections Department, he murdered another gang  
16 member. He talks about that in the recordings in  
17 this trial, which will be introduced.

18                 In 2009, Mr. Baca sent in a covert message  
19 through Jonathan Gomez, also known as "Baby G,"  
20 instructing him to assault another inmate.

21                 He's possessed heroin in the facility.

22                 And then, of course, in 2014, we now have  
23 the charged conduct, with the murder of Javier  
24 Molina.

25                 There is a statement here where he wanted a

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1 person identified as KS, in 2015, from Las Cruces, to  
2 hit a suspected informant, and who owed the SNM Gang  
3 member, Carlos Herrera, \$800 for drugs.

4 In 2015, Mr. Baca said that SNM Gang  
5 member, Carlos Herrera, and JR, a/k/a "BB," had made  
6 mistakes, and both members would be hit. That's  
7 discussed in this case as well. The Court has heard  
8 about that.

9 So that would be the third member in this  
10 courtroom who has something -- as Mr. Villa has  
11 indicated, has had a green light on him.

12 October 24, 2015, Mr. Baca said that SNM  
13 member, RB, was an informant, and he had ordered SNM  
14 members to hit him.

15 In 2015, he talked about being brought into  
16 the SNM Gang after he assaulted another inmate from  
17 orders of another SNM Gang member.

18 And then the rest is largely the charged  
19 conduct in this case.

20 The other issue with Mr. Baca was, we have  
21 one cooperator who said during, I believe, the  
22 Michael Astorga trial, which was an SNM member who  
23 murdered a police officer, that Mr. Baca had that  
24 cooperator -- he's now a cooperator -- follow jurors  
25 during that trial.

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1                 Looking at Mr. Herrera's history: In 1994,  
2 he's alleged to have contacted a victim or witness  
3 through a third party and threatened the witness'  
4 life. In 1994, he was arrested for aggravated  
5 battery and resisting or alluding officers. In 1994,  
6 he was arrested for aggravated assault on a police  
7 officer, and aggravated battery on a police officer.  
8 In 1994, while in custody in the Corrections  
9 Department, he threatened to assault a staff member.  
10 In '94, he refused to obey a lawful order.

11                 In 1996, in the Corrections Department, he  
12 refused to obey a lawful order.

13                 In '97, he possessed heroin. And also in  
14 '97 he used abusive words and gestures towards a  
15 staff member.

16                 In 1999, in the Corrections Department, he  
17 engaged in and coerced other to engage in activity  
18 that were a threat to the security of the  
19 institution.

20                 In 2001, he killed the person identified in  
21 the overt acts as MV. The police reports on that  
22 incident indicate that a person was over at Mr.  
23 Herrera's house, used drugs inside of the house. Mr.  
24 Herrera thought it was disrespectful, and  
25 disrespecting his mother in her house. As a result

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1 of him getting angry at that person, he ended up  
2 shooting that person in the chest and killing that  
3 person. In 2001, in the Bernalillo County Detention  
4 Center, he assaulted several correctional officers.

5 In 2005, in the Corrections Department, he  
6 battered a staff member. In 2005, on another  
7 occasion, he assaulted a staff member. And on  
8 another occasion, in 2005, he assaulted a staff  
9 member.

10 In 2006, he possessed shanks and assaulted  
11 a staff member. On that occasion he -- the officer  
12 opened up a food port. Mr. Herrera reached through  
13 the food port and slashed the corrections officer's  
14 leg.

15 In 2007, in the Corrections Department he  
16 disobeyed a lawful order. In 2007, he's alleged to  
17 have threatened to burn down his ex-girlfriend's  
18 house over the telephone.

19 In 2010, he threatened a staff member.

20 In 2011, he attempted to introduce  
21 narcotics into a prison facility by soliciting and  
22 utilizing a staff member. And his mother was  
23 involved in that incident.

24 In 2017, he threatened to blow up a federal  
25 building. I think that was a result of law

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1 enforcement hitting his mother's house with a search  
2 warrant. He was very unhappy about that.

3 Mr. Perez' history goes back to a 1987  
4 assault.

5 He was later convicted of burglary, and was  
6 found to be a habitual offender. There is assault on  
7 a family member in 1993.

8 In 1996, he assaulted inmates TF and DM.

9 In 2003, while in the custody of  
10 Corrections Department, he possessed a stinger, which  
11 is a homemade weapon.

12 In 2005, he was arrested for committing  
13 assault and resisting, as well as aggravated battery  
14 in 2006. That's a similar incident.

15 In 2010, he attempted to incite other  
16 inmates to become disruptive by throwing food and  
17 trash on the floor.

18 In 2011, he committed aggravated battery  
19 with a deadly weapon.

20 And battery in 2012.

21 In 2014, while in custody, verbally  
22 threatened a correctional officer, which I think is  
23 another reason why he was locked down.

24 The reports on Mario Rodriguez, who was one  
25 of the people who brought a shank to court -- and

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1       that was corroborated -- he's one of the people who  
2       told law enforcement that Carlos Herrera had a green  
3       light.

4                   THE COURT: It was corroborated because the  
5       next day he had the shank on him; correct?

6                   MR. CASTELLANO: He produced the shanks,  
7       Your Honor. So there was no doubt he brought shanks  
8       with him to court.

9                   And he also tells us that Mr. Sanchez asked  
10      Mr. Rodriguez for one of his shanks. But I think  
11      that's about the time he was thinking about coming  
12      over, and did not give that shank to Mr. Sanchez.  
13      He's also the one who told us that Mr. Herrera had a  
14      green light on him; that the other members were not  
15      happy with him about certain things that he said on  
16      the recordings, and thought he was being  
17      disrespectful to some of the other members.

18                  So Mr. Rodriguez isn't necessarily pointing  
19      the finger at just the other people. He was involved  
20      with that. And he agreed that Mr. Herrera had to go.  
21      So it's not as if this is a situation where Mr.  
22      Rodriguez is merely pointing the finger at others.  
23      He's actually implicating himself.

24                  The other issue, according to Mr.  
25      Rodriguez' report, is that there was talk about Mr.

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1 Herrera being good again in the feds if he committed  
2 a serious act of violence, or something else that  
3 would make him good.

4                   And one thing we know about the history of  
5 the SNM is that Michael Astorga was not good with the  
6 SNM. He killed a law enforcement officer. And there  
7 is a dispute to this day. Some people think that  
8 made him good and some people didn't. So someone who  
9 may be in harm's way with the SNM could commit a  
10 serious act of violence, and at least in some  
11 member's eyes that can make them good again.

12                  So I think there is plenty here, Your  
13 Honor. The Court has to make the individualized  
14 decision, and the totality of the circumstances. And  
15 the Court has to make the decision in a way that  
16 minimizes any prejudice to the defendants. And I  
17 think shackling, with their hands free, will do the  
18 job, especially when there are things in place to  
19 keep the shackles from making noise.

20                  THE COURT: But of the four remaining men  
21 going to trial on Monday, am I understanding none of  
22 them have an escape conviction or an escape charge?

23                  MR. CASTELLANO: I did not see that in  
24 these ones. I was reading over them pretty quickly,  
25 Your Honor, looking at them real quickly again. But

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1 I did not see that. I know that in some of the  
2 others there are allegations of attempted escapes.

3 THE COURT: All right. Did you have a  
4 question of Mr. Mickendrow?

5 MR. CASTELLANO: I did, Your Honor. One  
6 involved a shakedown of some of the cells of some of  
7 our defendants. And various things were found in the  
8 cells, including what are known as things to go  
9 fishing. It's a line with something else that they  
10 can throw under the door and exchange messages. But  
11 there were also small pieces of metal in there.

12 And the reason that's important is that Mr.  
13 Rodriguez in the 302 -- actually one of the  
14 attachments to one of the filings in this case --  
15 indicated that sometimes the inmates will take apart  
16 batteries, and things of that nature. And there is a  
17 small piece of metal in there that's like the shape  
18 and size of a nail. And those things can be  
19 flattened out and sometimes be used to pick the  
20 handcuffs. And that was actually corroborated  
21 separately by a shakedown at the cells. And that's  
22 the question I have for Deputy Mickendrow, is whether  
23 or not they found something similar to what was  
24 described by Mr. Rodriguez.

25 DEPUTY MICKENDROW: The answer would be yes

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1 to that question.

2                   And if the Court would permit, I also want  
3 to bring up a few facts that I had forgot to mention  
4 earlier. The first would be that, when Mario  
5 Rodriguez initially came to court that day, he was  
6 not a cooperating witness. And so from the  
7 perspective of the Marshal Service, just because he  
8 decided to reveal he had shanks on him because he was  
9 cooperating, that's an irrelevant fact for us. The  
10 fact is he came to court with no idea whether he was  
11 going to cooperate or not. He came to court assuming  
12 that he was going to continue in his case. So that's  
13 a very important distinction for us.

14                  Also, after that, when we did do a  
15 shakedown of the cells because of the production of  
16 those shanks, each of the defendants -- and I would  
17 have to check -- with exception to Mr. Perez, I  
18 believe, was found to have items within their cell,  
19 and deadly items. There was -- I believe three of  
20 the defendants, Mr. Herrera, Mr. Sanchez, and Mr.  
21 Baca, were all found to have razor blade shavers in  
22 their cells. And this is something that could be  
23 used as a deadly weapon.

24                  And, in addition, yes, we found items that  
25 could be used to circumvent our security measures.

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1           In addition, I also wanted to cover a few  
2 of the -- go back and cover a few more incidences  
3 regarding Mr. Perez that Mr. Villa had asked about.  
4 I was just made aware of two additional incidences,  
5 which also jogged my memory about a third. And  
6 although these are not in-court incidences, these are  
7 related to court.

8           In the one incidence, Mr. Perez was told to  
9 head downstairs by a CO and a deputy. And he told  
10 them, pretty much, he didn't want to because he  
11 wanted to go down with the Otero group. And he was  
12 told he would go down individually by himself, at  
13 which point he started using profanity against the  
14 deputy and the CO that was giving him instructions.

15           Another incident -- and this is while he  
16 was at the jail -- he went in for a medical  
17 procedure, and he convinced the CO that was  
18 overseeing him during that medical procedure to  
19 remove his leg irons. Ultimately, that CO was  
20 dismissed, because that's a direct violation of what  
21 is supposed to happen during medical procedures. If  
22 there is no reason for the removal of leg irons,  
23 they're not supposed to get removed.

24           And then finally, there has been several  
25 incidences, since the Marshal Service worked very

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1 diligently to get Mr. Perez transferred to Dona Ana  
2 County Detention Center, that I've had to speak with  
3 Mr. Perez regarding, not assaulting, verbally  
4 assaulting, the Dona Ana County Detention Center  
5 staff, because of what he perceives he should be  
6 provided while he's there. I have reminded him that,  
7 if he has issues, he should go through us. And that  
8 he should also be respectful of the staff.

9 So with all of those additional factors at  
10 play, it just again corroborates. My stance would  
11 be, as a law enforcement officer, we don't need to  
12 wait for somebody to hit us to realize that something  
13 is going to happen. When we see it coming at us, we  
14 can make an educated decision as to what to do.

15 And in this case, we're urging the Court,  
16 based on all of the factors that we've laid out here,  
17 that it would be prudent to have the defendants in  
18 this case restrained with at least leg irons.

19 THE COURT: All right. Do you have any  
20 other questions of Deputy Mickendrow?

21 MR. CASTELLANO: No, I don't. But I have  
22 an additional disclosure that I learned this week  
23 will go out in additional Giglio disclosures. What I  
24 can tell the Court is from an interview with Billy  
25 Cordova a few days ago, he also admitted that he came

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1 to court with a shank because he was concerned for  
2 his safety. So he brought it out of self-defense.  
3 He came to court and sat on the witness stand with a  
4 shank in his rectum. So he's the third person in  
5 this case, and the fourth person overall that we know  
6 from the larger investigation, who has actually  
7 brought a shank to court.

8 THE COURT: All right. There has been some  
9 additional information from the Government and from  
10 Deputy Mickendrow. Anyone have any questions of  
11 Deputy Mickendrow before he sits down?

12 Mr. Lahann.

13 MR. LAHANN: Your Honor, my client has an  
14 urgent need to use the restroom. He's been waiting  
15 about 10 minutes since he asked the marshals.

16 THE COURT: All right. Why don't one of  
17 the deputies go ahead and take him there.

18 All right. Any other questions of Deputy  
19 Mickendrow? All right. Thank you, Deputy. I  
20 appreciate it.

21 All right. Why don't -- let's see, Ms.  
22 Bhalla, Mr. Maynard, I think you were up, you wanted  
23 to speak on this issue.

24 MR. MAYNARD: Just briefly, Your Honor.

25 THE COURT: Mr. Maynard.

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1                   MR. MAYNARD: You know, the Court has heard  
2 about information coming from cooperating witnesses.  
3 There has been -- in getting to the point of  
4 individualized considerations, I don't think there is  
5 any credible indication that Mr. Herrera, at least,  
6 poses any threat of any disruption in the courtroom.  
7 I haven't heard anything this morning about that. I  
8 think the only basis would be pure speculation based  
9 on whatever criminal record there is. And the  
10 Marshal Service is basing it on the accusation about  
11 what happened in March of 2014. And there is really  
12 not much or anything since then.

13                   No shank has been found on Mr. Herrera. No  
14 one has pointed fingers at Mr. Herrera. And, in  
15 fact, if there were a green light, and -- that's  
16 speculation, there is no real evidence, credible of  
17 that -- there is nothing to indicate anything would  
18 happen in the courtroom.

19                   Your Honor, we're simply asking, and Mr.  
20 Herrera is asking that the shackles -- they can  
21 certainly be applied in the bus during  
22 transportation, in the cell blocks outside the  
23 courtroom. We're just asking that they be removed  
24 for proceedings in the courtroom. And in spite of  
25 everything that we've heard this morning, or

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1       including everything that we've heard this morning,  
2       there is no indication that something is going to  
3       happen in the courtroom itself, nothing indicating  
4       that Mr. Herrera is going to do anything in the  
5       courtroom himself. And so we would ask at least that  
6       Mr. Herrera not have to wear any shackles. Because  
7       what's happening is they're being treated as a group.

8                     THE COURT: All right. Thank you, Mr.  
9       Maynard.

10                  Anyone else want to speak on this motion?

11                  All right. Mr. Castellano, do you have  
12       anything further from the Government's standpoint?

13                  MR. CASTELLANO: I was just reminded  
14       that -- it's actually on one of the recordings that  
15       Mr. Herrera threatened to blow up the FBI building.  
16       So you can't say it's uncorroborated. It is on one  
17       of the recordings.

18                  I think there is plenty -- I think the  
19       Court is ready to make a decision on this. We've  
20       given the Court plenty of information about each of  
21       these defendants. And their histories are something  
22       the Court can take into account, histories of  
23       violence.

24                  THE COURT: All right. Thank you, Mr.  
25       Castellano.

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1                   Mr. Villa, it's your motion. Do you want  
2 to -- anything further you want to say on it?

3                   MR. VILLA: Judge, a brief housekeeping  
4 matter before I forget. Ms. Harbour-Valdez, I  
5 believe, filed an unopposed motion to seal the 1678  
6 document, which is the email.

7                   THE COURT: I've signed that this morning.

8                   MR. VILLA: Thank you, Your Honor.

9                   Just by way of argument, I think I sort of  
10 echo what Mr. Maynard said. You haven't heard any  
11 information that Mr. Perez presents a threat inside  
12 the courtroom.

13                  Now, let's talk about the incident that Mr.  
14 Mickendrow told you about, in which something  
15 happened with Mr. Garcia; he was taken out, and some  
16 of the defendants stood up and objected, voiced their  
17 problems. But, as you heard from Mr. Mickendrow, he  
18 gave Mr. Perez orders, or perhaps somebody under his  
19 charge gave Mr. Perez orders, and Mr. Perez sat down.  
20 He didn't have to be removed from the courtroom. And  
21 this didn't happen during court proceedings. It  
22 happened -- I think Mr. Mickendrow said during a  
23 break, or something like that.

24                  I think that's the information that you  
25 have to -- that's what you have to look at. There

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1       are certain places where folks go and they behave  
2       differently. So the way Mr. Perez or any of these  
3       defendants may have behaved in prison or in jail or  
4       with a CO during a medical visit is not necessarily  
5       the way you can judge whether they present an  
6       individualized risk here in court.

7                  And the fact that, you know, a  
8       cooperating -- a now cooperating witness, whether he  
9       intended to cooperate at the time -- brought a shank,  
10      doesn't tell you anything about what Mr. Perez may or  
11      may not do.

12                 Certainly, I would, if I were  
13      Mr. Rodriguez' lawyer, and asking you not to shackle  
14      Mr. Rodriguez I'd be in a much different position,  
15      because he brought shanks to court. But there wasn't  
16      any information that that was part of some  
17      conspiracy; that Mr. Perez provided those, allegedly,  
18      the pieces to make the shanks that Mr. Rodriguez  
19      brought, or anything else.

20                 And I think that it's clear that we're not  
21      dealing with any risk of flight, escape, attempt to  
22      get out of the courtroom.

23                 So, really, all we're dealing with is  
24      courtroom-specific violence. And I don't think the  
25      test can be: You've got a criminal history that has

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1 some violence and you're accused of a violent crime.

2 I don't think that the United States Supreme Court,  
3 when it wrote Deck, thought it would be sufficient,  
4 when it spoke to individualized risk of courtroom  
5 attack, of courtroom escape, courtroom violence.

6 I agree with Mr. Maynard, the United States  
7 Marshals can use any manner of shackling and  
8 handcuffing outside of this courtroom that they deem  
9 appropriate, and we really probably don't have any  
10 say in that at all. But while we're in the  
11 courtroom, in front of the jury, that's what we're  
12 talking about. So that's the judgment that I'd ask  
13 you to make is whether there is a specific risk in  
14 that setting. And I don't think there has been  
15 enough information presented to suggest there is.

16 THE COURT: All right. Thank you, Mr.  
17 Villa.

18 Any other defendants?

19 Well, I am concerned that -- the fact we're  
20 in a courtroom doesn't give me complete confidence.  
21 In fact, looking at the evidence on the Marcantel  
22 conspiracy, it seems to me the SNM group does look to  
23 make spectacular statements, and do them for fame and  
24 notoriety, and nothing, I think, could probably be  
25 more so than to do something here in a federal

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1 courtroom. And the evidence, I think, by a  
2 preponderance of the evidence, establishes that each  
3 of the four men that are going on trial are part of  
4 this gang, and that this gang is known for doing some  
5 things that they do for notoriety. I think each them  
6 have a history of violence.

7                   The proceedings have gone smooth, and the  
8 men have been respectful to the Court throughout the  
9 proceedings. But I am worried still that, in the  
10 heat of trial -- I'm worried about cooperating  
11 witnesses; I'm worried about each other, sitting next  
12 to each other in the trial. I am concerned about  
13 each one of them's safety.

14 And so I think that the Government and the  
15 Marshal Service have shown that each one of them  
16 should be shackled for the trial. I think that the  
17 jury will not be aware of it. I think we've gone at  
18 great lengths to position the tables and the bunting,  
19 put duct tape on, to prevent the jury from seeing or  
20 knowing about it. And we'll have it on the  
21 Government's table as well, so there will not be any  
22 suspicion about the bunting itself.

23 I'll continue to think about this issue.  
24 But at the present time, I'm inclined to think we  
25 ought to keep the shackles on for the trial. So I'll

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1 deny the motion. But I will deny the motion and  
2 continue to give it some thought.

3 All right. The next issue we are going to  
4 take up is the defendants' motion to strike  
5 surplusage from the second superseding indictment,  
6 Document 1657. I guess I was thinking that it might  
7 not be necessary to strike the material that's being  
8 sought. But I wonder if it's necessary that all that  
9 be put into the final set of jury instructions. We  
10 may be getting way ahead of ourselves by talking  
11 about final instructions. Although I know that  
12 people want to talk a little bit about those at the  
13 end of the day.

14 But I was thinking that all that really  
15 might be necessary to put in the jury instructions  
16 for the trial would be the counts that remain for  
17 trial. What would be the Government's thoughts about  
18 that? Not strike it from the indictment, but as far  
19 as when we get to the jury instructions, we just put  
20 the counts that are being tried in the jury  
21 instruction?

22 MS. ARMIJO: Your Honor, that's fine. I  
23 believe that's what you did in another case, a trial  
24 that we had, with a lot of surplus language. And  
25 most of that will come out through evidence anyway.

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1       So we don't want it stricken from the indictment.  
2       But certainly, I know that the Court has previously  
3       done that in other cases. And we can deal with that  
4       issue as it comes time for jury instructions. But we  
5       were under the belief that the Court was going to  
6       curtail it to the counts anyway on the jury  
7       instructions.

8                     THE COURT: Okay. Thank you, Ms. Armijo.

9                     I know this was Mr. Adams' and Ms.  
10          Sirignano's motion for the most part. But I think  
11          everybody else joined in it. Does anybody not think  
12          that's a good way to deal with it?

13                     Mr. Maynard?

14                     MR. MAYNARD: Your Honor, I'll use this  
15          microphone.

16                     The most important part is, with respect to  
17          jury instructions, we believe all those paragraphs  
18          relating to evidentiary allegations, which are not  
19          really elements, so to speak, they don't need to go  
20          to the jury. I don't think -- I mean, the  
21          indictments are written by prosecutors. They're  
22          drafted by prosecutors who counsel the Grand Jury and  
23          so forth. And I think it's just too much  
24          editorializing. And one way to deal with it, at a  
25          minimum, is just to take those paragraphs that are

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1 mentioned in the motion to strike out of any jury  
2 instructions.

3 THE COURT: I think that's what I'm  
4 inclined to do, and I think that's what Ms. Armijo is  
5 agreeing to. So when you see my first draft, you'll  
6 probably see the counts, but not the prefatory  
7 language before the counts.

8 MR. MAYNARD: That's all.

9 THE COURT: Anyone else?

10 All right. So I'm inclined to deny the  
11 motion to strike, but I'll grant the motion to keep  
12 it out of the jury instructions, and then we'll begin  
13 to work on that.

14 All right. Let's go to the joint motion to  
15 renew motion to sever defendants charged with  
16 offenses in Counts 6 and 7.

17 I'm not sure, do we have the updated chart,  
18 Mr. Hammond? Still working on it? So you have to  
19 work with what I've got there, and that is not  
20 complete. And when we get this other, it's going to  
21 be much longer.

22 I don't have any second thoughts this  
23 morning about the law, as I have interpreted it so  
24 far. And I've been working hard on the opinion from  
25 which this chart is taken; not quite done with it.

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1       Partly because I keep getting filings. And so it's  
2       hard to get on top of it, because I keep getting  
3       filings. And I learn things from the filings. Y'all  
4       are much more familiar with the evidence than I am.

5                     The Government's response, Mr. Braun's  
6       response -- is Richard Williams back over at your  
7       office?

8                     MR. CASTELLANO: Yes, Your Honor.

9                     THE COURT: He came back from the district  
10      attorney's office?

11                    MR. CASTELLANO: No, he never left.

12                    THE COURT: Oh, okay. I guess I'm  
13      confusing him. Who went over to the -- retired and  
14      went over to the --

15                    MR. CASTELLANO: Mark D'Antonio did when he  
16      retired from our office. David Williams?

17                    THE COURT: David Williams, okay. All  
18      right. I'm sorry, it's David Williams.

19                    I didn't think it was a resounding response  
20      from the Government. And my concern is, one of the  
21      reasons I wanted Mr. Braun to see the chart, and for  
22      y'all to see the chart, is that I'm having to prepare  
23      a chart for the trial, to turn to the jury and tell  
24      them how to deal with this evidence, the number of  
25      limiting instructions. And so if I'm having to

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1 prepare a chart -- and that's just with the evidence  
2 I know -- I'm beginning to have some concerns -- not  
3 beginning to; I've had concerns since, really, Billy  
4 Cordova got on the stand on December 19. And the  
5 next day, you remember, I really began to question  
6 how we were going to do this.

7 Every time I see the motion, though, to  
8 sever 6 and 7, it never seems to work. It doesn't  
9 seem to address the big problems. It seems to me to  
10 not deal with the big problems. The two big problems  
11 I think we have are going to be when Cordova and  
12 Duran take the stand, and then all the tape  
13 recordings. That's when the limiting instructions  
14 are at their highest, and when the evidence that  
15 we're asking the jury not to consider most implicates  
16 the other defendants.

17 For example, the reason I don't think that  
18 the defendants have persuaded me that we should  
19 separate out the Marcantel and the Baca counts is  
20 because most of that evidence is -- it's not -- it  
21 doesn't terribly implicate the other individuals.

22 And so, when I think about the case, the  
23 case has a story, Counts 6 through 12: You have the  
24 Molina hit, and then you go down, security goes down,  
25 and then it comes up with another murder; goes down;

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1 comes up with another murder. It tells a story.

2                 But we have these two areas of evidence  
3                 that are going to come that we're going to have to  
4                 tell the jury to disregard. And I'm concerned that  
5                 we're going to have a volume of limiting  
6                 instructions. And also they come with evidence that  
7                 is incriminating of other people besides Mr. Perez  
8                 with Cordova, and with Mr. Herrera as far as Duran.  
9                 Those seem to me to be the most critical spots.

10               Severing 6 and 7 from the other counts doesn't seem  
11               to solve that problem.

12               When you think about it, it seems to me  
13               that it would be better to sever defendants than to  
14               sever counts. Mr. Baca and Mr. Sanchez can be tried  
15               fairly well together, and Mr. Herrera and Mr. Perez  
16               tried together. Their evidence doesn't really  
17               implicate each other.

18               So I haven't thought the Government has  
19               really come to grips with the number of limiting  
20               instructions that are going to be given, and whether  
21               that would really withstand scrutiny, and would be  
22               something that would, if there were convictions,  
23               would be seen as good judging and good trial work by  
24               us all when it got to the Tenth.

25               On the other hand, the defendants, I don't

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1 think, have really put forth a real proposal that  
2 shows -- we're going to be sitting here in this room  
3 listening to a lot of evidence on enterprise if we  
4 sever 6 and 7. And I don't think we get a lot by --  
5 the Marcantel stuff out. I understand why the  
6 defendants want it, it's because it's the more  
7 sensational evidence in the trial, but it's not  
8 particularly incriminating, as you look for under  
9 Bruton and the others.

10 But I do think that they have made a point  
11 about the ability of the jury to really grapple with  
12 the number of very proper and required limiting  
13 instructions.

14 So this is what I'm thinking of doing on  
15 Monday, is I'm thinking about impaneling two juries.  
16 I think, if we had two juries; one for -- one I'll  
17 call the Baca-Sanchez jury, and one the Herrera-Perez  
18 jury, I think we could excuse them at the appropriate  
19 times so that they don't hear the evidence. There  
20 will be some evidence with Mr. Baca, where I'll have  
21 to give a limiting instruction, but you're entitled  
22 to limiting instructions. But the evidence is not  
23 incriminating Mr. Sanchez. And then, if a separate  
24 jury hears the Perez and the Herrera evidence, that's  
25 not particularly incriminating of both.

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1                   As far as opening statements, the  
2 Government would have to just avoid getting into that  
3 evidence that we're keeping out of both juries, or we  
4 might just have to have two openings. But it seems  
5 to me that, given the amount of limiting  
6 instructions, I don't have a better solution.

7                   As far as the new motion that was filed two  
8 or three days ago about Mr. Herrera, you know, that's  
9 new evidence. I haven't seen that. So I can't  
10 really make the sort of detailed findings I can about  
11 Mr. Cordova and his testimony about what Mr. Perez  
12 said. But it may be that it's -- you know, it's just  
13 hard for me to make much comment on that without  
14 having seen the evidence.

15                  But, in any case, I'm not inclined to sever  
16 out 6 and 7; that doesn't seem to me -- it never has  
17 seemed to me to be quite the solution. But I do  
18 think that the defendants have pointed to enough  
19 problems that maybe the way to do it is to pick two  
20 juries, and have, at critical points, the juries  
21 excused so that the number of limiting instructions  
22 is greatly reduced. Or when they are given, they're  
23 given because they're allowed. But the evidence that  
24 we're asking the jury to ignore is not probative of  
25 the other defendant in that case.

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1           I know you've been standing, Mr.  
2 Castellano. But why don't I let -- I think this was  
3 Mr. Villa's motion this time. So let me let him  
4 start the motion. Mr. Villa?

5           MR. VILLA: Thank you, Judge.

6           I respect what the Court is saying with  
7 respect to the issue of severing 6 and 7. I don't  
8 want to let that one go, so I'll just say briefly for  
9 the record -- it's been said a lot already, I think,  
10 but I think it does solve one problem, and that's  
11 some of the things we've been talking about with  
12 respect to the need for shackles, and sort of lumping  
13 everybody together, is that there is this -- evidence  
14 is going to be put on, of course, by the Government  
15 that Counts 6 and 7 is an SNM ordered hit. The  
16 Marcantel-Santistevan piece was an SNM ordered hit,  
17 and all of it was in furtherance of the SNM and their  
18 racketeering.

19           So the 6 and 7 defendants' concern is that  
20 the jury hearing this, and hearing the sensationalism  
21 of it, and the recordings discussing it, by the same  
22 person allegedly, Anthony Ray Baca, who orders the  
23 Molina hit, that you have this spillover effect, and  
24 that the jury lumps it all together. Because I think  
25 it's always been the contention of the 6 and 7

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1 defendants, and certainly Mr. Perez, that the  
2 Government's case is much stronger on the  
3 Santistevan-Marcantel side than it is on the Counts 6  
4 and 7 cases. And pairing two -- these two cases  
5 together because of the spillover effect, because  
6 they're all allegedly SNM related activities, and the  
7 defendants are all allegedly SNM members, presents  
8 that issue of prejudice.

9 Now, I just want to understand -- I get  
10 what the Court is proposing with respect to -- or why  
11 the Court is proposing it with respect to Mr. Perez,  
12 Herrera, and Baca-Sanchez. I guess I just want to  
13 explore exactly what the Court is contemplating. Are  
14 you talking about -- one potential avenue when you  
15 have two juries, is Jury No. 1 comes in and they just  
16 hear the evidence as to Baca-Sanchez, or however we  
17 do it, and then Jury No. 2 comes and hears the  
18 evidence that's Perez-Herrera? Or are they both here  
19 at the same time given instruction?

20 THE COURT: No, I would think that we'd  
21 want -- I mean, they'd be here for evidence that we  
22 know is going to be duplicated in a severed trial.

23 MR. VILLA: Yeah.

24 THE COURT: But the evidence that we're  
25 concerned about with limiting instructions, if we can

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1 take the jury out for those, I would see that we  
2 would excuse them for that testimony.

3 MR. VILLA: I see. And then maybe --

4 THE COURT: So they'd be here together  
5 probably a lot of the time, and then they would be  
6 excused -- for example, Baca-Sanchez would be excused  
7 while we're hearing Cordova talk about his recordings  
8 of Perez. And then I don't think that the  
9 Duran-Cordova stuff hurts the two of you very much,  
10 but it's Baca that really gets hit by the Cordova  
11 stuff. And then there is going to be stuff that the  
12 jury should not hear. I'd be giving a limiting  
13 instruction of things that Baca said.

14 MR. VILLA: Well, I'd say Cordova certainly  
15 hurts us, Your Honor. But I understand what you're  
16 saying.

17 THE COURT: Yeah, I understand.

18 MR. VILLA: And I think, if that's the  
19 solution -- and I'm just processing this now -- it  
20 seems to me -- and I'm interested to hear what my  
21 colleagues say -- that we might want to consider  
22 separate opening statements, separate closing  
23 arguments, because of how we may characterize some of  
24 the evidence that comes into play.

25 THE COURT: Well, I would think that -- at

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1       the closings, I would definitely think that you would  
2       need to have separate closings.

3                    MR. VILLA: All right.

4                    THE COURT: Now, I think on openings, it  
5        would kind of depend on how detailed the Government  
6        wanted to get. I mean, if it wanted to talk about  
7        Billy Cordova is going to say these statements in its  
8        opening statement about Mr. Perez, and I'm going to  
9        have limiting instructions that that can't be used  
10      against anybody else, I'm not sure that that -- that  
11      we should have joint opening statements. I think  
12      there, we'd probably have to have separate opening  
13      statements.

14                  MR. VILLA: That's my concern, too, Your  
15      Honor. Because I think what we present in our  
16      opening statement, if we choose to put on an opening  
17      statement in the beginning, would, I think, change  
18      drastically depending upon what the Court intended.

19                  THE COURT: So I think it's probably the  
20      Government's call as to how general they're going to  
21      get, if they're going to get specific as to the  
22      evidence that I'm going to say only can be used  
23      against certain people; give a limiting instruction.  
24      Then we may have to have separate opening statements.

25                  MR. VILLA: And that's all I have on -- the

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1 motion focused on --

2 THE COURT: You filed a motion to sever 6  
3 and 7. After listening to me sort of comment that it  
4 doesn't seem to solve the evidentiary problems; it  
5 may -- if you're looking at the case as a defense  
6 lawyer, it addresses the -- shall I call it the 403  
7 problem? But would you agree with me it doesn't  
8 really solve the evidentiary problems? It may help  
9 you a little bit on the 403 issue.

10 MR. VILLA: I would agree that it doesn't  
11 solve the internal or intra-6 and 7 problems. I  
12 agree with that. I think -- I'm not sure Mr. Perez  
13 is the one that would be requesting a severance of a  
14 defendant necessarily, given the problems. You know,  
15 for instance, the statements that Mr. Cordova may  
16 testify to that Mr. Perez makes, I can't keep those  
17 out. You know, after the Court's suppression ruling,  
18 I don't have an evidentiary issue. But Mr. Sanchez  
19 does. And so it might be Mr. Sanchez that needs to  
20 speak to that problem. It's not really, I think, Mr.  
21 Perez' burden here.

22 THE COURT: Okay. Thank you, Mr. Villa.

23 Anyone else want to speak from the  
24 defendants' standpoint on the motion to sever?

25 Mr. Maynard?

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1                   MR. MAYNARD: Your Honor, I have never  
2 tried a case like that, with two juries. And it's  
3 going to involve -- I doubt if many lawyers here  
4 have. I just don't know. It's going to involve  
5 recompartmentalizing our directs and our  
6 cross-examinations, and all of that. And the juries  
7 are going to be coming in and out, in and out. I'm  
8 not sure how much -- it may -- ironically, it may  
9 make the trial longer even -- and in fact it probably  
10 will.

11                  But I would urge the Court to consider --  
12 in fact, if the two cases, the 6 and 7 are severed  
13 from 8 to 12, those two trials put together, each of  
14 them is going to be shorter, and they may be no  
15 longer than a joint trial with two juries, if the  
16 Court is concerned with saving time.

17                  THE COURT: Well, but that was what I was  
18 talking with Mr. Villa. It doesn't seem to me that  
19 the problems that I am most concerned about, the  
20 evidentiary problems, are solved by severing 6 and 7  
21 from the other counts. It just -- the trial has a  
22 story. And you've got a murder, and then it goes  
23 down; you've got a murder, it goes down; the security  
24 goes down. I mean, it tells a story. I think we're  
25 going to hear it multiple times in the trial. So it

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1 doesn't seem to me that 6 and 7 is the way to --  
2 every time I look at it, I never see how that saves  
3 us anything.

4 MR. MAYNARD: Well, I don't think it saves  
5 a lot. I understand that.

6 THE COURT: I mean, it always seems to me  
7 the problem is not the counts. It's the individual  
8 defendants that I have to protect their rights. And  
9 it seems to me we focused on severing counts -- and I  
10 remember with Sanchez' renewed motion. I mean, in  
11 the first motion and in the second motion -- except  
12 for a little bit stuff about a year-and-a-half ago,  
13 where we did identify some Bruton problems with a  
14 small amount of the Government's evidence -- until  
15 late December, we hadn't focused on the fact -- and  
16 in both those opinions I could confidently say nobody  
17 has identified any evidence that's not going to come  
18 in against other defendants.

19 And then, when we got Mr. Cordova on the  
20 stand, I think -- and y'all did a lot of discovery --  
21 it looks a lot different, in the sense that I don't  
22 think we can say that statement is true any longer.  
23 There is evidence coming into this trial that cannot  
24 be used against all defendants. And I think when  
25 December 19 rolled around, we began to see that.

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1 That's been the bigger problem than splitting it  
2 along count lines.

3 Your thoughts on that?

4 MR. MAYNARD: Well, I understand. And yet,  
5 I'm not sure that having two juries -- it's going to  
6 be kind of like -- I think it's going to make the  
7 trial longer.

8 THE COURT: I do, too.

9 MR. MAYNARD: And it's going to make it  
10 more complicated. And I think we're going to have to  
11 be very careful not to make, in closing argument,  
12 reference to evidence that was only admitted  
13 against --

14 THE COURT: Well, that's the reason I was  
15 saying to Mr. Villa. I just think we're going to  
16 have to have separate closings. So we'll bring one  
17 jury in, the Sanchez-Baca jury; we'll have closings.  
18 Then we'll turn around with the Perez-Herrera jury,  
19 we'll bring them in.

20 MR. MAYNARD: I'll use a white pad for when  
21 one jury is in the room and a yellow pad when the  
22 other one is in the room.

23 THE COURT: Yeah.

24 MR. MAYNARD: Or when the witness --  
25 anyway --

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1           THE COURT: I don't disagree on either  
2 point. I think you're right.

3           MR. MAYNARD: I would just -- you know, I  
4 think in the interests of fair trials and efficiency,  
5 I think having two trials, and just severing them  
6 completely would be no longer and no more expensive.

7           THE COURT: Well, you're saying -- I mean,  
8 the motion on the table is to separate 6 and 7.

9           MR. MAYNARD: Yes.

10          THE COURT: And I guess I just have not  
11 figured out how that solves any problems. What is  
12 your severance proposal?

13          MR. MAYNARD: Just to separate 6 and 7.

14          THE COURT: Still 6 and 7?

15          MR. MAYNARD: Yes.

16          THE COURT: See, I just think -- I'm going  
17 to still, in a 6 and 7 trial, I'm still going to give  
18 all these limiting instructions. I don't think it  
19 solves the problems.

20          All right. I think Ms. Jacks was getting  
21 up. So let me let Ms. Jacks speak.

22          MS. JACKS: I just have a couple of  
23 comments.

24          What the severance of 6 and 7 does is  
25 protects the Counts 6 and 7 defendants from all of

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1 the evidence of Counts 8 through 12 that's completely  
2 inadmissible against them.

3 THE COURT: But it's not terribly -- it's  
4 not incriminating. That's the thing. You just don't  
5 want it -- it's a 403 problem, like I was telling Mr.  
6 Villa. You don't want those in the case. But  
7 they're not incriminating.

8 MS. JACKS: Well, I think it's  
9 incriminating as to the SNM, and to the extent the  
10 jury believes they're associated with that gang, I  
11 think it's incriminating.

12 As the Court's noted, it's inflammatory.  
13 It's the conspiracy to murder public officials. And  
14 so I don't think it's just a 403. I think it's a  
15 Fifth Amendment due process issue. And I go back to  
16 Jackson versus Denno. I think that the Counts 6 and  
17 7 defendants have a right to be tried, and to have  
18 their guilt or innocence of Counts 6 and 7 determined  
19 by a jury that's not polluted with weeks of  
20 inadmissible evidence about plots to kill public  
21 officials. And that is what the Counts 6 and 7  
22 severance does.

23 And I guess -- I'll just point out to the  
24 Court, I think in a joint -- if we were to have a  
25 joint trial of Counts 6 through 12, the issues within

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1 the Counts 6 and 7 trial regarding the statements of  
2 Mr. Perez to Billy Cordova, or the statements of Mr.  
3 Herrera to Gerald Archuleta, those problems could be  
4 solved by just keeping those statements out.

5 THE COURT: Well, they could. But that's  
6 the Government's case. I think that's heavy-handed  
7 for me to do that.

8 What else, Ms. Jacks?

9 MS. JACKS: I've tried trials with two  
10 juries. And, logistically, I think it's difficult.  
11 And I guess what I'm just thinking about in my head  
12 is, where is everybody going to sit? We barely have  
13 a courtroom where the defendants have a place to sit,  
14 where they can work. So I'm wondering about that.

15 I'm wondering, I -- mean, I think there are  
16 going to be issues going forward about when one jury  
17 is going to be excused, and how that's going to  
18 happen. I mean, I think we can work through it. But  
19 it is a complicated situation.

20 And then I guess the other thing I'm  
21 thinking about is do we have enough jurors coming on  
22 Monday to select two juries?

23 THE COURT: Well, if we fail on Monday,  
24 then we fail on Monday. I guess I'd rather try, see  
25 if we can get two picked. If we don't, then I might

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1 have to go to some other plan B. I'd like to plan  
2 for success rather than plan for failure.

3 I guess, as far as seating, I don't have  
4 anything better than back here where Mr. Walz is. I  
5 was talking to Ms. Wild a little bit about this.  
6 Those benches are not as comfortable as the ones up  
7 here, as y'all have probably all noted. And you  
8 know, we might rotate them a little bit when they're  
9 all in here together. Ms. Wild didn't like that idea  
10 much. But there would be some seating arrangements  
11 that we'd have to work out.

12 MS. JACKS: The other thing that concerns  
13 me as, Mr. Sanchez' counsel, is just the sort of  
14 unspoken optics of the situation. Because I do  
15 think, if we have two juries going at the same time,  
16 and one is the Sanchez-Baca jury; then I think it  
17 basically tells the jury that Sanchez is a leader.  
18 And it gives the jury, I think, some information  
19 that's very difficult for them to disregard, and very  
20 difficult for us, as Mr. Sanchez' lawyers, to address  
21 without highlighting the problem.

22 And then I also think that --

23 THE COURT: Doesn't Mr. Sanchez want to be  
24 a leader?

25 MS. JACKS: Your Honor, there are a lot of

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1 things that have been said in this Court that are  
2 just simply untrue. But I'm trying to save some of  
3 that for the trial.

4 THE COURT: Sure.

5 MS. JACKS: And just because some  
6 cooperator, looking to get a deal on his murder case  
7 says something, doesn't mean that I believe it.

8 THE COURT: All right. Well, I look  
9 forward to it. I look forward to the trial.

10 I hear what you're saying. You don't want  
11 to be grouped with Mr. Baca.

12 MS. JACKS: Well, and I guess the other  
13 thing, to me, if I were representing Mr. Perez or Mr.  
14 Herrera, I'd be fighting with the Court to say, Look,  
15 openings and closings have to be completely separate.  
16 If I was representing Mr. Perez or Mr. Herrera, I'd  
17 say: I don't want my jury to hear anything about the  
18 Marcantel-Santistevan stuff. There is no reason for  
19 them to hear it.

20 And so, if that happens, then Mr. Sanchez  
21 is really getting the short end of the stick, because  
22 he's not charged with the Marcantel and Santistevan  
23 conspiracies, but his jury is going to hear that.  
24 And I just don't think that's fair.

25 THE COURT: Well, I'm not thinking the

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1 Marcantel stuff is going to stay out of either trial.  
2 I mean, that, to me, is the 403 stuff. And I've not  
3 been convinced that's the biggest problem.

4 MS. JACKS: I hear you.

5 THE COURT: I think the real problem is  
6 Duran and all his testimony, and the tapes that are  
7 associated with that, and Mr. Cordova and all the  
8 tapes associated with him. I think those are the  
9 ones that really are incriminating other people  
10 besides Mr. Perez and Mr. Herrera.

11 MS. JACKS: I hear you. But the Marcantel  
12 in the severed-two-jury situation, the evidence of  
13 the Marcantel-Santistevan conspiracies is  
14 inadmissible against Herrera and Perez.

15 THE COURT: It is, but it's not terribly  
16 probative of any incriminating activities.

17 MS. JACKS: I would disagree. But I'll  
18 leave that for them to argue. But I think it would  
19 be unfair to Mr. Sanchez for his jury to hear that,  
20 when he's not charged with it, especially if other  
21 defendants, who are charged in the same counts as Mr.  
22 Sanchez, are not going to have their jury polluted by  
23 that information.

24 THE COURT: All right. I understand the  
25 point. I'll give it some thought.

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1                   Do you want to speak again, Mr. Maynard?

2                   MR. MAYNARD: Just briefly, Judge, to  
3 suggest a plan B, I guess. You know, thinking about  
4 this -- and I'm still trying to get all of the facts  
5 in this case, or at least enough of the facts in the  
6 case for my working memory. I've only been here for  
7 about two months, not even. But I think perhaps the  
8 most efficient break should be a break of defendants.  
9 So you could try 6 and 7, just Perez and Herrera, and  
10 the other counts, the other defendants could be  
11 severed. It might be even more efficient. And it  
12 might be even less evidentiary problems. So I would  
13 suggest that to the Court as another option.

14                  THE COURT: Well, there is no doubt, you  
15 know, you sever, sever, sever, it reduces problems.  
16 But it also starts creating a lot of inefficiencies  
17 in the case, as well to just hear the same evidence  
18 over and over.

19                  But I hear your point. But it does sound  
20 like you're now looking at severance from defendants'  
21 standpoint, rather than counts standpoint.

22                  MR. MAYNARD: I think so. I think that  
23 resolves more of those issues. And it's no more  
24 inefficient -- I think having two juries is going to  
25 invite potential error, because of some unintentional

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1 mistakes by counsel for either party.

2 THE COURT: Well, there is always potential  
3 error. I guess I'm trying to avoid the error that's  
4 kind of setting with us right at the moment, of a lot  
5 of limiting instructions. I think it does -- it  
6 could greatly reduce that. It's not going to  
7 eliminate it, but it's going to greatly reduce it.

8 All right. Mr. Lowry.

9 MR. LOWRY: Your Honor, I don't want to  
10 belabor the point. But I, too, would echo the  
11 sentiments of my colleagues, and look for either  
12 separate trials. And I still would adhere to the  
13 division -- I know that this is not the Court's  
14 preference -- between 6 and 7, and 8 and 10.

15 Your Honor, looking at the jury  
16 instructions we proposed, I think Your Honor made the  
17 comment that the Marcantel information is not  
18 necessarily incriminating on Mr. Sanchez. You know,  
19 I agree with Ms. Jacks. I would even take it a step  
20 further. I think, frankly, the jury is going to  
21 easily interpret that as 404(b) propensity evidence,  
22 in terms of the Marcantel-Santistevan allegations.  
23 And the reason is, the Government's -- my  
24 understanding is that the Government will use Counts  
25 8 and 10 as enterprise evidence.

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1           And if you look at the jury instructions  
2       that were proposed, you can see how, through that  
3       instruction, they're going to have to demonstrate the  
4       pattern of racketeering activity. And my guess is  
5       that they're going to want to pick that particular  
6       allegation to use that in their pattern of  
7       racketeering activity, because it is sensational,  
8       because it is attention grabbing, and because it is,  
9       frankly, inflammatory.

10           And I think that that is absolutely the  
11      reason the Court should look at the severance along  
12      those lines, if not anything else under the 403  
13      analysis that you just mentioned.

14           THE COURT: Let do this: I don't want to  
15      rush your comments, but I do need to let Ms. Bean  
16      rest her fingers. Why don't we go ahead and have our  
17      recess for about 15 minutes, then we'll come back in.

18           (The Court stood in recess.)

19           THE COURT: All right. Mr. Lowry, I think  
20      you were --

21           MR. LOWRY: Your Honor, I think where we  
22      left off is the type of severance proposed by the  
23      Court really doesn't resolve the 403 problem, because  
24      the Marcantel-Santistevan material will still be  
25      inadmissible as to Defendant Sanchez, and we're still

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1 going to have a parade of limiting instructions.

2 THE COURT: It's a limiting instruction,  
3 but it's not terribly probative against them. That's  
4 the problem. I'll give the limiting instruction  
5 because it will be requested, and he's entitled to  
6 it. But it's not incriminating of him.

7 MR. LOWRY: But this dovetails back into  
8 the issue that I wanted to raise -- and Ms. Jacks  
9 wisely pointed out to the Court -- the optics of this  
10 are going to be terrible. You're going to have Mr.  
11 Sanchez and Mr. Baca separated from Mr. Perez and Mr.  
12 Herrera. They get their own jury. And their jury is  
13 going to be left with the tacit impression that, Oh,  
14 my God, here are these alleged leaders of the SNM,  
15 and even the Court is treating them drastically  
16 different than the rank and file alleged members of  
17 the SNM, and we have to be on guard to the heightened  
18 sensitivity to that. And there is no limiting  
19 instruction. There is no way to divorce the optics  
20 from the 403 issue. And, in fact, the optics  
21 reinforces the 403 problem, and reinforces the  
22 magnitude of the problem, that they're going to  
23 consider the inadmissible evidence as to Mr. Sanchez  
24 that the Court has instructed them not consider. And  
25 this is why Ms. Jacks cited the case law, that you

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1 once throw the skunk into the jury box, you just  
2 can't pull it back out.

3 THE COURT: That's the reason I'm trying to  
4 prevent the skunk from going into the jury box.

5 MR. LOWRY: And I applaud the Court's  
6 efforts, Your Honor. I don't want the Court to think  
7 otherwise. But I think the safest and most  
8 reasonable means to avoid appellate error would be to  
9 have two separate trials.

10 THE COURT: Of what? I mean, the proposal  
11 from Mr. Villa on the table is 6 and 7. And I've  
12 just stared at that, and it just never seems to solve  
13 the problems I'm most concerned about.

14 MR. LOWRY: You know, this is -- well, in  
15 my mind --

16 THE COURT: So what's your severance  
17 proposal?

18 MR. LOWRY: I think you could still sever 6  
19 and 7. And to the extent the Government wants to use  
20 the Marcantel-Santistevan allegations as evidence of  
21 the enterprise, I think maybe the parties ought to  
22 talk about Old Chief'ing that evidence somehow, to  
23 sanitize it, so that you don't have this limiting  
24 instruction issue, and we don't have the host of  
25 problems that we've been talking about. That would

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1       be one thought, as I sit here this morning, Your  
2       Honor. But I see the logistics of two jury panels  
3       handling two separate defendants is going to heighten  
4       the problems with, you know, Jeez, the Court has  
5       treated Mr. Sanchez and Mr. Baca differently. And  
6       the implicit assumption is they're being treated  
7       differently because they've been determined to be the  
8       alleged leaders of the SNM.

9                          Your Honor, the Tenth Circuit has looked at  
10      this issue -- I was just going to cite these cases  
11      for the Court -- in United States versus McVeigh, the  
12      Tim McVeigh case. You know, Judge Matsch looked at  
13      this and considered the possibility of separate  
14      juries at a single trial. And gave up on that as  
15      impractical for a whole host of reasons. And that is  
16      at 169 Federal Rules Decision 362, at pin cite 371,  
17      District of Colorado in 1996. And, of course, that's  
18      the trial where Mr. McVeigh was going to be tried  
19      with Terry Nichols. The Court declined to do that in  
20      a single trial with separate juries.

21                          Also, the Tenth Circuit has looked at this  
22      in Wilson v. Simmons, at 536 F.3d 1064. That's a  
23      Tenth Circuit opinion from 2008. And the Court has  
24      considered that, and found it to be relatively  
25      impractical.

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1                   THE COURT: Well, but it noted in Wilson --  
2 now, Wilson was a habeas case that was coming out of  
3 the state system. But it did, I think, say that  
4 every court that had considered it had found it to be  
5 constitutional. I mean, anything can be used in an  
6 unconstitutional way, but -- I am looking for the  
7 sentence that said what it said. I don't see the  
8 quote I was looking at from that case. But you've  
9 got a number of Tenth Circuit cases that approve it.  
10 They certainly point out difficulties with it, but  
11 they --

12                  MR. LOWRY: I don't know, Your Honor. But  
13 I think you --

14                  THE COURT: Here it is, "Indeed every  
15 federal appellate court that has considered a dual  
16 jury system has upheld the procedure."

17                  MR. LOWRY: And I'm not saying that it's  
18 unconstitutional, Your Honor. What I am saying is  
19 there is going to be an ongoing, daily, from witness  
20 to witness argument between the parties of how we  
21 impanel a specific jury for that specific witness.  
22 Like Mr. Duran, for instance. I'm sure he'll have  
23 one chapter of common evidence that's relevant to  
24 both juries. And then we're going to have to decide  
25 between the parties which jury gets the break, and

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1 which jury hears which evidence first. And I just  
2 think it's going to invite a host of tactical issues  
3 that the parties are going to have to litigate on a  
4 daily basis.

5 This is going to continue the length of the  
6 trial. And I know the Court has been sensitive about  
7 the length of this trial already. And I think we've  
8 run well past the eight-week period, which is going  
9 to be an issue now not for one jury, not for 18  
10 jurors, but perhaps 36.

11 And I think it's going to heighten the  
12 level of tension in the courtroom between the parties  
13 and the Court, of how we handle the trial. And  
14 everybody wants to have this done in a fair and level  
15 headed manner that doesn't prejudice the rights of  
16 anybody else in the courtroom. And I just foresee  
17 ongoing daily problems with just the mechanics of  
18 making this work in a way that everybody can agree  
19 with.

20 THE COURT: All right. Thank you, Mr.  
21 Lowry.

22 Anyone else from the defense side want to  
23 speak?

24 Ms. Jacks?

25 MS. JACKS: I actually do have a couple of

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1 comments. One is the Court said that the evidence of  
2 the Marcantel-Santistevan stuff is not terribly  
3 probative as to Mr. Sanchez.

4 THE COURT: I meant incriminating.

5 MS. JACKS: Right. Incriminating. And I  
6 would agree with you if this was just a murder case.  
7 But this is a VICAR case. And some of the elements  
8 of the Violent Crime in Racketeering is that the SNM  
9 was a racketeering organization that engaged in  
10 racketeering activity. So the evidence of the  
11 Marcantel-Santistevan murder conspiracies goes  
12 directly to elements of the crime. So it is terribly  
13 incriminating as to Mr. Sanchez.

14 And in a joint trial with Mr. Baca, what's  
15 going to happen -- a joint trial of Sanchez and  
16 Baca -- the Court is going to be telling the jury:  
17 You can consider this evidence for all purposes as to  
18 Mr. Baca, but you can't consider it for any purpose  
19 as to Mr. Sanchez.

20 And that puts a juror in a really untenable  
21 position of taking evidence of the racketeering  
22 organization and the racketeering activity, and using  
23 it against one defendant and completely just ignoring  
24 its existence as to the other. Jurors aren't  
25 computers. They're people. And I think that's a

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1 really hard thing to tell a jury not to consider.

2 THE COURT: Well, I certainly agree with  
3 the procedure. I guess I'm thinking that's less of a  
4 problem than the problems we have.

5 MS. JACKS: We're kind of at a Sophie's  
6 Choice. Neither choice that we have, at least  
7 neither choice that's being presented to Mr. Sanchez,  
8 is something that he would want.

9 And then I just want to point out something  
10 else. And this is in discussions that I had in the  
11 hall during the recess. But I just want to give you  
12 an example of an issue that's going to come up with  
13 two juries. And there may be a way to solve it. But  
14 there is a tension here.

15 And let's just consider for a minute the  
16 anticipated testimony of Mario Rodriguez. Mario  
17 Rodriguez is a government cooperator, and I believe  
18 that on his direct examination Mr. Rodriguez is going  
19 to testify that he took Mr. Perez' -- a piece of Mr.  
20 Perez' walker after Mr. Sanchez threatened Mr. Perez.  
21 And the cross-examination of Mr. Rodriguez, from Mr.  
22 Sanchez' perspective, is going to be one thing. But  
23 I think, from the perspective of Mr. Perez, it's  
24 possible that his counsel is going to actually adopt  
25 that, and claim that Mr. Rodriguez is actually

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1 telling the truth about that. So in terms of --  
2 maybe the direct could be presented to both juries.  
3 But the cross-examination is going to bring out, I  
4 think, a tension or a conflicting -- potentially  
5 conflicting defenses, where Mr. Sanchez is going to  
6 take the position that Mario Rodriguez is an  
7 unmitigated liar. And Mr. Perez is going to take the  
8 position that Mario Rodriguez is telling the truth,  
9 and Sanchez threatened Perez.

10 And I think issues like that, at least in  
11 my experience with two juries, issues like that come  
12 up every day with every witness.

13 The other just couple of comments I have is  
14 the trials that I've had with two juries have been in  
15 large downtown Los Angeles court building, where  
16 there is plenty of room to keep them apart, separate  
17 jury rooms, separate bailiffs to take charge of them  
18 and make sure they don't intermingle. I'm not  
19 sure -- even in spite of that -- I've been involved  
20 in a case where one jury was hung -- this is on a  
21 capital case, multiple murders -- one jury is hung 10  
22 to 2 for not guilty -- this is during deliberations;  
23 the other is hung 11 to 1 for guilty. And hold-out  
24 on that jury held out because she was friends with  
25 jurors on the not guilty jury. And the case ended up

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1 being mistried. I think in another instance a case  
2 ended up being mistried because of the inadvertent  
3 presentation of evidence to one jury that shouldn't  
4 have been presented. So on a daily basis, it just  
5 increases the amount of unforeseen issues that can  
6 pop up.

7 So, I mean -- I would just argue that if  
8 the Court is inclined to sever, I think that it would  
9 be better just to have one jury, one trial, and do  
10 the second trial sequentially.

11 THE COURT: Well, but what -- the proposal  
12 that's on the table from the defendants is severing 6  
13 and 7 -- is that still where you are? -- which  
14 doesn't really solve a lot of the problems that  
15 you're addressing.

16 MS. JACKS: Where I am, if you're asking me  
17 how I would want the trial to be: I'd want 6 and 7  
18 severed and Perez --

19 THE COURT: I'm sorry, I didn't hear that.

20 MS. JACKS: I would want Counts 6 and 7  
21 severed. And that would be for the due process issue  
22 of the Santistevan-Marcantel evidence that's  
23 inadmissible against the 6 and 7 defendants coming in  
24 before their jury. So to prevent that due process  
25 violation, and to prevent -- well, due process and

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1       403. So sever 6 and 7. And any statements that  
2 Perez or Herrera made to informants that are not  
3 admissible against Mr. Sanchez don't come in at a  
4 joint trial.

5                     THE COURT: You don't ask much, do you?  
6 Thanks, Ms. Jacks.

7                     All right. Any other defendant wish to  
8 speak on the severance issue?

9                     All right. Mr. Castellano.

10          MR. CASTELLANO: For starters, I have to  
11 disagree with the two-jury system. I think, if we do  
12 that, rather than having limiting instructions, we're  
13 going to have curative instructions throughout the  
14 trial. I agree with some of the other comments by  
15 defense counsel that these are all capable attorneys  
16 in this room, but there are going to be mistakes made  
17 about which evidence should go to which jury. We're  
18 going to be tripping over the evidence, and trying to  
19 get it all straight. That's going to be more  
20 complicated than anything else.

21          So, in addition to any other instructions  
22 we have, we're going to be constantly trying to fix  
23 evidence that went before the jury that wasn't  
24 supposed to go before the jury.

25          The problem also, from the Government's

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1 perspective, is there will be disagreements about  
2 what is racketeering evidence, for example. So if  
3 the Court excuses one jury and says there are certain  
4 things that shouldn't go before that jury, but we  
5 disagree, what's happened is that jury is now not  
6 hearing evidence which they think should be heard,  
7 which is really a suppression of the evidence. So,  
8 by having the jury leave the room and not hear  
9 evidence, which it should, the Court will be, in  
10 essence, suppressing evidence during trial. And, of  
11 course, for us, that creates issues for appeals.

12 THE COURT: Hold on just a second.

13 Somebody on the telephone doesn't have their mute  
14 button on. We're getting a lot of feedback from one  
15 of the call-in people.

16 Mr. Castellano.

17 MR. CASTELLANO: So if the evidence  
18 continues not to come in, which we think is being  
19 suppressed, because we think the right jury is  
20 leaving the room to hear the evidence, then we have  
21 to deal with issues of suppression and interlocutory  
22 appeals during trial.

23 So when it gets to a point of disagreeing  
24 with the Court, to the extent that evidence isn't  
25 coming in before a certain jury, then we have our own

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1 problems that evidence not coming in, which we think  
2 should come in.

3 So I think two juries is going to overly  
4 complicate things. I think the movement will  
5 complicate things.

6 And I guess the other thing we really need  
7 to figure out is, if we have one jury, we really have  
8 to figure out which -- what evidence are we worried  
9 about?

10 THE COURT: Well, could you live without  
11 Cordova and Duran in this case, and those phone  
12 calls?

13 MR. CASTELLANO: No. No, because the other  
14 thing the Court has to understand --

15 THE COURT: It seems those are the two  
16 biggest packages that are going to really generate  
17 the most limiting instructions. They're the ones  
18 that I think the defendants are most concerned about  
19 incriminating people that they can't be admitted  
20 against.

21 MR. CASTELLANO: They should be concerned  
22 about those witnesses.

23 THE COURT: But they can't be used against  
24 them.

25 MR. CASTELLANO: Well, that's not

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1 necessarily true. Because what the Court is focusing  
2 on is what the Court knows about now. But these  
3 witnesses can talk about --

4 THE COURT: I think that's a good point.

5 I've got a long list of limiting instructions. And  
6 it doesn't -- and that's just what I've seen. That's  
7 just what was generated from the James hearing --

8 MR. CASTELLANO: Right.

9 THE COURT: -- and some other testified  
10 that came up.

11 MR. CASTELLANO: Right. Witnesses like  
12 that can talk generally about drug trafficking on  
13 behalf of the enterprise. That meets the element as  
14 to all defendants: Robberies, murders. The jury is  
15 going to hear about other murders in this case other  
16 than what's charged, and that's permissible, and  
17 that's actually required if we want to get a  
18 conviction in this case, because we have to put on  
19 racketeering activity on behalf of the enterprise.  
20 So the jury is going to hear about other murders,  
21 other assaults, other drug activity.

22 THE COURT: But they can't hear it from Mr.  
23 Perez' statements coming through Cordova. That's the  
24 problem.

25 MR. CASTELLANO: Right. I mean, what we're

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1 focusing on are Mr. Perez' statements. And the jury  
2 is going to hear that he's admitted to at least two  
3 other people that the shanks came from his walker.  
4 So that is not the only source of the evidence where  
5 he made admissions to him giving up his walker.  
6 That's coming in through other witnesses as well, at  
7 last two.

8 So I think we have to -- rather than just  
9 taking this as a whole, we have to cut it in pieces  
10 and see what is it that we're worried about. So  
11 we're worried about Mr. Perez' statements, it looks  
12 like. After that we have --

13 THE COURT: And Herrera's through Duran.  
14 Those are the two that, when you look at that chart,  
15 and the chart that I'm still working on, you're going  
16 to get the biggest number of limiting instructions.

17 MR. CASTELLANO: So in a single trial, it  
18 seems to me that's where the instructions come from,  
19 is two witnesses. Mr. Perez has eight statements.

20 THE COURT: Two witnesses and the  
21 audiotapes that are associated with it.

22 MR. CASTELLANO: Right. The Court knows  
23 Mr. Perez has eight audio recordings. So that's what  
24 the limiting instructions come in there, and then  
25 with Mr. Herrera, same thing, we have to sort through

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1 which statements to bring in there. But I think  
2 that's about it.

3 THE COURT: That's pretty big.

4 MR. CASTELLANO: It's pretty big. Like I  
5 said, eight statements from Mr. Perez. And the other  
6 question becomes what is the limiting instruction to  
7 the jury? Is it: Ladies and gentlemen of the jury,  
8 this information, statements by Mr. Perez, are to be  
9 admitted only against Mr. Perez in your determination  
10 of your finding of guilt, and no other defendant? Is  
11 there anything else that they should be instructed  
12 on?

13 THE COURT: I think that would be the  
14 instruction. But I think listening to those tapes,  
15 that's -- that does incriminate Mr. Baca -- I'm  
16 talking about the Perez ones --

17 MR. CASTELLANO: Right.

18 THE COURT: -- and others. And it seems to  
19 me that we're asking a lot of the jury to not  
20 consider that evidence.

21 MR. CASTELLANO: With each instruction we  
22 can ask the jury: I've instructed you that this  
23 evidence only comes in against Mr. Perez. Does  
24 anyone have a problem following that instruction?  
25 And it's basically a polling of the jury each time.

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1                   And the other question is: Does the Court  
2 instruct before and after each statement is  
3 introduced? And by that I mean each recording. Or  
4 is the Court thinking about interrupting each of the  
5 recordings to instruct along the way?

6                   THE COURT: Well, I probably will do it as  
7 often as the defendants want it to be asked. But if  
8 you look at the chart, at the places where I'm going  
9 to probably have to be giving the instruction or  
10 saying they can't consider it, I anticipate it's  
11 going to be a lot.

12                  MR. CASTELLANO: Right. And if they  
13 request an instruction, they should get an  
14 instruction. And I think, then, they have their  
15 pulse on the trial. And when they think it's  
16 necessary, and the Court can give those instructions  
17 as they deem necessary. And that protects them and  
18 it protects the trial.

19                  Now, I've cited to the Court before U.S.  
20 versus Diaz. It's a Second Circuit case, 176 F.3d  
21 52. And it says -- I understand this is a Second  
22 Circuit case, but it says, "Refusal to sever a joint  
23 trial with federal defendants is virtually  
24 unreviewable. A district court's denial of a  
25 severance motion will be reversed only if a defendant

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1 can show prejudice so severe that his conviction  
2 constituted a miscarriage of justice and that the  
3 denial of his motion constituted an abuse of  
4 discretion." This is the case I've discussed with  
5 the Court before. And the argument for severance was  
6 spillover.

7 So in that case, the complaining defendant  
8 was implicated in one of nine murders. He was tried  
9 over a three-month period before the same jury, which  
10 heard volumes of evidence that his co-defendants,  
11 among other things, committed eight unrelated murders  
12 and other acts of violence, sold narcotics, and  
13 maintained and shared weapons for use in their  
14 criminal activities. They say, "First, the evidence  
15 in dispute is relevant to the charges against all  
16 RICO defendants because it tended to prove the  
17 existence and nature of the Latin Kings and their  
18 RICO enterprise, and a pattern of racketeering  
19 activity on the part of each RICO defendant, by  
20 providing the requisite relationship and continuity  
21 of illegal activities." It then cites to a case  
22 called *Brady*, at 26 F.3d, at 287, holding that "there  
23 was no prejudice from admission of evidence regarding  
24 murders as background evidence."

25 So this is not the first time that any

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1       court has been in the situation. In this case, they  
2       complained about being involved in one out of nine  
3       murders. And I think if a court of appeals can hold  
4       a case together like that, when you're one out of  
5       nine murders -- he sat there the whole time while  
6       other murder evidence was introduced against other  
7       defendants, and it was upheld on appeal -- so I think  
8       this has been contemplated before, and I think it can  
9       be done.

10                  As the Court has said, it's going to take  
11       work with limiting instructions. But as often as  
12       defense requests them, the jury can be instructed  
13       accordingly.

14                  But I think one jury is certainly better  
15       than two. I think two just invites more error to the  
16       record.

17                  Related to the Court's question about the  
18       rulings on appeal, the statements were -- obviously,  
19       unless there is a change in the statement of law, our  
20       position stands for purposes of appeal.

21                  The other issue the defense raised was, if  
22       the anticipated evidence at trial is different --  
23       we're talking about recordings here, so I don't think  
24       we have a concern about the evidence being different  
25       at trial. The recordings are what they are. And so

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1 that evidence will come in as it is. So I think that  
2 is obviously less of a concern in terms of any change  
3 in position by the Government.

4 I don't have anything else unless the Court  
5 has questions.

6 THE COURT: If -- getting back to the  
7 motion on the table -- you're opposed to that  
8 motion -- if I were to sever, how would the  
9 Government propose I sever?

10 MR. CASTELLANO: Certainly not the proposal  
11 of Counts 6 and 7. I agree with the Court, that  
12 doesn't solve any problems. We're faced with the  
13 same exact issues regarding jury instructions.  
14 Obviously, we would oppose it. But the better option  
15 is severing defendants, as opposed to severing --

16 THE COURT: How would you do it? The way  
17 I'm thinking of Sanchez and Baca, and then Perez and  
18 Herrera?

19 MR. CASTELLANO: If I was forced into a  
20 decision, that would be the decision; would be Mr.  
21 Perez and Mr. Herrera in their trial, and the other  
22 two in the other trial.

23 THE COURT: And who would you try first?

24 MR. CASTELLANO: I'm not sure. I haven't  
25 thought that far ahead. I know one who wants to go

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1 first, but I'm thinking separately from that. I'm  
2 not sure. I'd have to think about that in terms of  
3 witness availability, and who we have lined up, and  
4 who we wouldn't be calling if the Court were to do  
5 that.

6 THE COURT: All right. Thank you, Mr.  
7 Castellano.

8 Mr. Villa, anything else you want to say on  
9 your motion?

10 MR. VILLA: Your Honor, nothing more with  
11 respect to why I think 6 and 7 ought to be separate.  
12 I'll stick to that.

13 But if the Court were going to consider as  
14 a remedy to the concerns it has with the intra-counts  
15 6 and 7 issues, or statements and things like that, I  
16 would echo what some others have said, that rather  
17 than a two-jury setup, that we have two separate  
18 trials.

19 I think that I understand the Court would  
20 get some efficiency from the duplicative evidence  
21 that could be put on. But I think that I would agree  
22 that would it take just as long, and be just as  
23 difficult. And there is much less chance of  
24 prejudice if we do it that way. But, again, I think  
25 that the Court ought to -- I know you've looked at

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1       it -- but consider why we're asking that 6 and 7  
2       ought to be severed in the way we are.

3                  That's all I have.

4                  THE COURT: All right. Thank you,  
5       Mr. Villa.

6                  Let me ask you one other thing, Mr.

7       Castellano: If I do feel that I need to have two  
8       juries, rather than trying to deal with the  
9       evidentiary problems particularly Duran and Cordova  
10      present, would you prefer to have joint juries or two  
11      separate trials?

12       MR. CASTELLANO: I mean, if I can kind of  
13      think this through. If we have two separate trials,  
14      we have to figure out where to fit the next trial.  
15      We already have trials lined up for April and July.  
16      Mr. Baca and Mr. Sanchez are also in the July trial.  
17      So we have to figure out whether we put them back to  
18      back, or try them first, get them out of the way, and  
19      come back and revisit them in July. Mr. Herrera and  
20      Mr. Perez, I don't believe they're in any other  
21      trial. So the question is who we keep waiting.  
22      Because at this point there is no other time.

23                  I know the July trial, the RICO case, those  
24      defendants have previously said -- I don't know if  
25      their position has changed -- but they're not moving.

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1 That's a fixed date for them, and they will not agree  
2 to any other continuances. I don't know what the  
3 April trial people will say. But now we're going to  
4 have to fit in a fourth trial somewhere.

5 THE COURT: It sounds like you would prefer  
6 to have -- given the choices the Court's putting to  
7 you, that you'd rather have two juries than two  
8 separate trials?

9 MR. CASTELLANO: I think that's right, as  
10 I'm thinking through it. Because, otherwise, there  
11 is nowhere else to fit these cases. And we might as  
12 well get it over with. I think it will be difficult.  
13 But I think between those choices and thinking it  
14 through now, two juries maybe is better. I certainly  
15 don't like it. But given the choices, I would pick  
16 that choice over a separate trials, especially given  
17 the other trials lined up.

18 THE COURT: Thank you, Mr. Castellano.

19 I've jumped to Mr. Castellano to ask him  
20 those questions.

21 Anybody else have any comments, arguments?

22 Well, I'm going to deny the motion to  
23 sever. I just have looked at it repeatedly, and it  
24 doesn't seem to solve any problems to me, and it  
25 doesn't seem to me to create the problems that the

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1 defendants propose. I've thought about that a long  
2 time, written two opinions on it, relooked at it.  
3 And it just doesn't seem to raise the problems that I  
4 think has more recently arisen with the evidence and  
5 the discovery that we've had over the last month. So  
6 I'm going to deny the motion to sever.

7 At the present time, I'm planning on  
8 picking two juries on Monday. And I don't minimize  
9 the difficulties. But we've known we're going to  
10 have some difficulties with limiting instructions  
11 once we began, on December 19, to start listening to  
12 informants and tapes and things like that.

13 And so, I think, given the choices, I would  
14 rather work hard to have two juries hearing this  
15 evidence than to have juries listening to some of  
16 this evidence and trying to deal with the amount of  
17 limiting instructions that I know I'm going to have  
18 to give. So I think we'll give it a try.

19 All right. Then the next motion is the  
20 motion to compel Brady and the Giglio materials  
21 pertaining to cooperating defendants. Let me pull  
22 that up here. I believe that Mr. Villa, Ms.  
23 Fox-Young, that's your motion. I think it's joined  
24 by Mr. Troup and Mr. Arturo Garcia.

25 What -- y'all probably have had some

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1 discussion, since this was filed a few days ago.

2 Where are we on it? What needs to be -- what hasn't  
3 been worked out and what needs to be addressed?

4 MR. VILLA: Your Honor, just taking it in  
5 order, I believe, with respect to Number 1 and 2,  
6 it's sort of the same thing; that I believe these  
7 defendants, the cooperating co-defendants listed in 1  
8 and 2, are housed in the same area. And there is  
9 some sort of shakedown, and a cellphone was  
10 confiscated, as well as drugs. And I may be wrong  
11 about whether they're housed in the same area. But  
12 we've asked for the cellphone information as well as  
13 the results of the drug testing. I think -- I'm not  
14 a hundred percent sure if that information is  
15 available or not. I think the United States said  
16 they would provide it when it's available. It has  
17 not been provided. So they'll have to speak to that.

18 THE COURT: Let me -- let's take these one  
19 at a time. Is there anybody -- any other defendant  
20 that needs or wants to speak on this before we hear  
21 from the Government? Ms. Bhalla?

22 MS. BHALLA: Thank you, Your Honor.

23 And you may want to address this issue  
24 later. But we did file a sealed supplemental to this  
25 motion based on some evidence that we reviewed in the

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1 new discovery. And I don't know if the Court -- it  
2 may benefit me to bring that up so that the  
3 Government can address that in one fell swoop. Or we  
4 can wait, Your Honor.

5 THE COURT: I have read everything other  
6 than what came in yesterday. When did you file that?

7 MS. BHALLA: It was filed on -- I think it  
8 was filed on Wednesday, Your Honor; Tuesday or  
9 Wednesday. When did I leave? Yeah, it should have  
10 been filed on Wednesday, Your Honor. I think it's  
11 1688.

12 THE COURT: I had it right behind the  
13 motion. So we'll just take those motions then  
14 together, okay.

15 MS. BHALLA: Did Your Honor want to hear  
16 from me now?

17 THE COURT: Do you have anything from the  
18 Government on the cellphone?

19 MS. BHALLA: No, Your Honor.

20 THE COURT: Why don't we hold up and hear  
21 the Government on that. But I'll take your motion up  
22 at the same time.

23 Do you want to speak before the Government  
24 does, Mr. Lowry?

25 MR. LOWRY: Your Honor, just in terms of

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1 one additional bit of the Brady information. In  
2 terms of the Jencks Act disclosures, there is a 302  
3 with Lupe Urquiza that talks about a telephone call  
4 that he had with Gerald Archuleta, that hasn't been  
5 disclosed. And I would consider that Brady because  
6 he's responding to Mr. Archuleta for calling the hit.

7 THE COURT: Does that 302 indicate that  
8 it's the contents of a cellphone?

9 MR. LOWRY: No, it's not the contents.

10 THE COURT: Let's take the cellphone first.  
11 Anybody else on the cellphone issue?

12 All right. Mr. Beck, are you going to  
13 handle this?

14 MR. BECK: Yes, Your Honor. Items 1 and 2  
15 are not in the United States' possession. Those are  
16 in a local drug task force possession. They're  
17 investigating the crimes. We will have -- I mean, I  
18 anticipate, with some new Giglio disclosures based on  
19 discussions we've had in the last weeks, Jerry  
20 Montoya and Eugene Martinez and Roy Martinez will  
21 give their portions of what occurred with those. But  
22 we don't have possession of those items.

23 THE COURT: Are they a joint task force  
24 with the federal government?

25 MR. BECK: They're not, no. It's local.

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1                   THE COURT: They're just local drug task  
2 force?

3                   MR. BECK: Local, like local drug  
4 trafficking agencies. So it's a state government,  
5 not part of the federal government. We've asked  
6 for -- and I anticipate that we will receive  
7 information as it becomes available. And when we do,  
8 we will turn that information over to the defense.  
9 But it's not part of the federal government. We  
10 don't have it in our possession. We can't get that.

11                  THE COURT: Would you have any opposition  
12 if we were to issue a subpoena for those phones, see  
13 if we can move it along?

14                  MR. BECK: No.

15                  THE COURT: Would that help you out, Mr.  
16 Villa, on those two, both that and the drug test, I  
17 guess? That's what you mean by number 2, right?

18                  MR. BECK: That's right, Your Honor.

19                  THE COURT: What if we issued subpoenas  
20 out, and maybe that would move them along, to give to  
21 the Government, so they could turn them over to you  
22 whatever they got.

23                  MR. VILLA: I think that would be a good  
24 solution, Your Honor. If the Government would  
25 identify the right agency or individuals to send that

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1 subpoena to. And I do think that those paragraphs  
2 one and two, the drug tests and the cellphone, are  
3 all part of one investigation. But Mr. Beck may  
4 correct me on that.

5 THE COURT: Can you supply enough  
6 information to help Mr. Villa put a subpoena  
7 together?

8 MR. BECK: I think so, yeah. I can't do it  
9 right now. I don't have it in front of me. But I  
10 think we can by the end of the day.

11 THE COURT: Okay. Does that work for  
12 everyone on one and two? Not hearing any objection,  
13 then we'll put a subpoena together. And if that  
14 doesn't do it, we'll come back to it.

15 MR. VILLA: So, Your Honor, I don't know  
16 how this ends up playing out. I don't believe Mr.  
17 Gallegos is on the Government's -- or Mr. Eugene  
18 Martinez is on the Government's will call list for  
19 Trial 1. But Mr. Montoya is. And I think Mr.  
20 Martinez, Roy Martinez, might be a may call -- no,  
21 he's a will call, excuse me. So, if the subpoena  
22 gets issued, and the agency says, Great, we'll have  
23 it to you Friday, but the Government wants to put on  
24 these two witnesses Thursday, or something, I mean, I  
25 guess I would ask for some sort of relief in that, or

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1 notice about what's going to happen in terms of who  
2 the Government is going to call.

3 THE COURT: I'm not sure the question I  
4 should ask you. But do you have a response?

5 MR. BECK: Yeah. I think -- I mean, I  
6 think we go forward. It's not -- I know at least the  
7 phone is not Jerry Montoya's phone. It's Richard  
8 Gallegos' phone. The drugs -- I don't know whose  
9 they are. I think -- as I said, I think there will  
10 be new Giglio disclosures about drug use by some of  
11 our will call list in the past couple weeks and  
12 months. Other than that, I don't see a remedy here.  
13 I mean, they can inquire and ask them about what that  
14 is. But I mean, I don't see that there is a basis  
15 for a remedy.

16 THE COURT: So the two people that you're  
17 calling, that you're calling are --

18 MR. BECK: Jerry Montoya in Number 1, and  
19 Roy Martinez in the Number 2.

20 THE COURT: Roy Martinez in the second.

21 MR. BECK: Right.

22 THE COURT: Do you know if they're coming  
23 up in the next week, witness-wise?

24 MR. BECK: Roy certainly is not. I don't  
25 anticipate Jerry Montoya would be either.

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1                   THE COURT: All right. Well, that will  
2 give you a few days to get it going. Let's see if we  
3 can get the subpoenas out and avoid a problem.

4                   What else do you have on your motion?

5                   MR. VILLA: So I'll move to number 3, Your  
6 Honor. This is a legible copy of Mario Rodriguez'  
7 notes. It can came -- in production to us it's  
8 Exhibit 2 to the motion, and it's sort of attached,  
9 or part of a 302. And the notes are not legible. As  
10 soon as we got them, we inquired of the discovery  
11 coordinating folks if they had a better copy. They  
12 said they didn't. They said they would follow up  
13 with the United States. We haven't heard back.

14                  I think it's important because it may or  
15 may not be other information that we're looking for.  
16 There is a recording that was recently disclosed, in  
17 which Mr. Rodriguez is with Mr. Acee and some others,  
18 and he's talking about corrections that he's made to  
19 Mr. Acee's 302. And I don't know if that's what this  
20 document is, or if it's a different document.

21                  And so, again, with Mr. Rodriguez'  
22 testimony imminent, we'd like a legible copy of his  
23 notes. And to the extent there is something else  
24 that Mr. Rodriguez is referring to on this recording,  
25 of making corrections to Mr. Acee's 302, we would

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1 want the draft 302 that Mr. Rodriguez made  
2 corrections on, and any other notes that there are.

3 THE COURT: Is this a curable problem, Mr.  
4 Beck?

5 MR. BECK: Is it a what, Your Honor? I'm  
6 sorry.

7 THE COURT: Curable.

8 MR. BECK: Yes. We have the notes. They  
9 should be going out today or tomorrow.

10 THE COURT: Are they legible?

11 MR. BECK: I mean, I don't know how much  
12 better they are than what we've got. But I think  
13 they will be a better copy.

14 THE COURT: Do you have the original?

15 MR. BECK: We do. I think we do.

16 THE COURT: Do you have it with you today?

17 MR. BECK: No. I think we have the  
18 original.

19 MR. CASTELLANO: I think I saw a copy of  
20 the notes. I think what they tried to do was  
21 photocopy them with a different contrast or a darker  
22 one. So I think the copy picked it up, and it's  
23 going out in the disclosure today. I know that they  
24 were trying to make copies on the copy machine to  
25 bring out the writing from the notes.

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1                 THE COURT: And when it goes out today, is  
2 it going directly to defense counsel or is it going  
3 to --

4                 MR. CASTELLANO: It will go to Mr. Aoki,  
5 the discovery coordinator.

6                 THE COURT: Okay. Would it be possible if  
7 somebody in your office could give one copy to Mr.  
8 Villa, and Mr. Villa could be responsible for getting  
9 it to anybody else that wanted it?

10                MR. CASTELLANO: I think so. I think  
11 they're numbered. We could disclose it under the  
12 normal disclosure rules, and then disclose it as well  
13 to Mr. Aoki.

14                THE COURT: Would that work?

15                MR. VILLA: That would, Your Honor. And  
16 I'd also ask if you would ask, order the Government,  
17 if we're still unable to read the copy we get, if I  
18 could inspect the original.

19                THE COURT: Do you have any problem with  
20 that, Mr. Beck?

21                MR. BECK: That's fine. I mean, my  
22 understanding they're with FBI in Albuquerque. So it  
23 can't be done immediately. But we would figure out  
24 how to get that done.

25                MR. VILLA: We can give them six hours.

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1                   We'll see if the copy we get is workable,  
2 Your Honor. But I appreciate it.

3                   Number 4, there is two exhibits we've  
4 attached to the motion, Exhibits 3 and 4. They are  
5 confidential informants. They're listed by number so  
6 we don't know the identities of those informants.

7                   The Government, when it produced its  
8 Jencks, produced a letter identifying the majority of  
9 individuals who weren't identifiable on whatever the  
10 report was, or if they were redacted. But these two  
11 specific informants I don't believe were disclosed.  
12 So we're asking for their identities pursuant to  
13 previous orders and agreements of the parties on  
14 these issues.

15                  THE COURT: Do you have any problem giving  
16 these names?

17                  MR. BECK: I think we gave those to Mr.  
18 Lowry and Ms. Duncan, so I think they have those  
19 names.

20                  MR. LOWRY: Your Honor, I've been working  
21 with Ms. Armijo. And regrettably, she's not in the  
22 courtroom. We gave her a list, and it's on our  
23 witness list. I don't know if they're called CIs on  
24 this particular document. But my recollection, Your  
25 Honor, is there is about six or seven names on that

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1 list. And so far we've only gotten two. And I'm  
2 happy to share those with my colleagues.

3                   But I've been in discussions with Ms.  
4 Armijo over the last week to try to collect those  
5 other names. And I wanted to augment the motion to  
6 compel with those names. Despite our best efforts  
7 and repeated requests, we still don't have the list.  
8 And they're of particular import to Mr. Baca's  
9 defense.

10                  THE COURT: Well, am I understanding  
11 correctly, you don't have any objection to producing  
12 the names, right?

13                  MR. BECK: That's right. I mean, there are  
14 certain CIs throughout New Mexico Corrections  
15 Department documents that -- we've said over and over  
16 again we don't have -- Corrections doesn't have those  
17 names anymore, we don't have those names anymore. So  
18 those won't be produced because they don't exist.  
19 We've tried to track those down. But to the extent  
20 that we have them, it sounds like we're going to  
21 produce them. And I don't have a problem  
22 double-checking, making sure that happens.

23                  THE COURT: On the ones that you do have  
24 the ability to produce and you are willing to  
25 produce, can you propose a deadline by which to do

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1 it?

2 MR. BECK: We can do that Monday, by the  
3 end --

4 THE COURT: Would that work for you?

5 MR. VILLA: Yes, Your Honor.

6 THE COURT: Okay. All right.

7 MR. LOWRY: Do we know how many that have  
8 fallen between the cracks here?

9 THE COURT: Do you know at the present  
10 time?

11 MR. BECK: I don't. I mean, I'm guessing,  
12 if you give us names and they don't come back, we'll  
13 tell you.

14 MR. LOWRY: If I could give them names that  
15 would be a problem solved.

16 MR. BECK: If you give us numbers.

17 THE COURT: You mean the exhibit numbers?

18 MR. BECK: No. What he's saying is giving  
19 us a list of, like, CI 136. And if we have who CI  
20 136 is, we give him a name back. If we don't give  
21 him a name back, we don't have that information.

22 We're not withholding CIs' names we have.

23 THE COURT: Does that work for you?

24 MR. LOWRY: Yes, Your Honor. And I've  
25 given them that list. But I'll do that again.

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1                   THE COURT: All right. Does that take care  
2 of number 4 then, Mr. Villa?

3                   MR. VILLA: It does, Your Honor. Number 5  
4 is field notes. And Exhibit 5 explicitly identifies  
5 field notes taken by Special Agent Neale regarding an  
6 interview of David Calbert, who is going to testify.  
7 It says that they're digitally attached to the -- I  
8 think it's 1A file -- I think we put IA in the  
9 motion. But those notes have not been produced. And  
10 it appears from the 302 that they still exist and are  
11 attached digitally to a file.

12                  THE COURT: Both of these are going to be  
13 witnesses, Mr. Beck? Duran and Calbert?

14                  MR. BECK: David Calbert will be a witness.  
15 Eric Duran will be a witness, yes. But I don't  
16 believe their notes would be -- I mean, I don't  
17 believe Special Agent Neale's notes of those would be  
18 Giglio, as long as the notes -- or I mean, they  
19 wouldn't be David Calbert's Jencks unless they are  
20 substantially verbatim. And as long as their notes  
21 are reduced to writing in the 302s, then the notes --  
22 I mean, there is no requirement that they're  
23 produced.

24                  THE COURT: Well, you know what I've  
25 written on FBI agent notes.

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1                   MR. BECK: If they are substantially  
2 verbatim, then they're to be produced. I believe  
3 that's Your Honor's ruling.

4                   THE COURT: Well, how else do people take  
5 notes? They try to be as verbatim --

6                   MR. BECK: I can tell you that the  
7 agents -- and oftentimes agents do, and in this case  
8 agents do take shorthand notes, and then, when we  
9 reduce their notes to writing, the actual 302 is more  
10 lengthy than the notes would be.

11                  THE COURT: Well, if you want me to make a  
12 call on them, you can. You can give them to me in  
13 camera. But, generally, I'm going to require those  
14 notes to be produced. So either produce them or send  
15 them to me in camera for review.

16                  MR. BECK: Okay.

17                  THE COURT: Anything else on that?

18                  MR. VILLA: Is the same deadline okay, Your  
19 Honor, end of business Monday?

20                  THE COURT: Does that work for you, Mr.  
21 Beck?

22                  MR. BECK: That will work, Your Honor.

23                  MR. VILLA: The last thing on the motion is  
24 paragraph 6. I think the Court just recently issued  
25 an order related to this inspection of the tablets of

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1 the cooperating defendants. But May 11, when the  
2 Court ruled on this tablet issue and returning it to  
3 the defendants, it also ordered the Government to  
4 review for Brady and Giglio the cooperating  
5 defendants' tablets, because there was an issue of  
6 perhaps whether they tampered with them, access to  
7 the internet, communicated with individuals outside  
8 of the detention center where they were. And we have  
9 not received anything from the Government one way or  
10 another about that.

11 THE COURT: Mr. Beck, did you conduct those  
12 reviews?

13 MR. BECK: No. The Court issued the  
14 written order yesterday. We've forwarded that to the  
15 FBI. The FBI would not inspect the tablets without  
16 the actual court order. So now not that they have  
17 it, they will inspect the tablets. I don't know how  
18 quickly that will be done. It's towards the top of  
19 their things to do list. But it may not be at the  
20 very top because they have other pressing matters  
21 that they're inspecting at this time. So I don't  
22 know when that will be done. But I know that, as of  
23 last night, the FBI is moving forward with that  
24 because they now have the order.

25 MR. VILLA: Your Honor, we can have our

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1 expert do it immediately. We don't need to get in  
2 the way of pressing business of the FBI.

3 The Court signed the order for inspection  
4 recently. But on May 11th of 2017, it ordered the  
5 Government to conduct the Brady-Giglio review. So I  
6 think that's a good solution. Let the defense do it.

7 THE COURT: What's your thoughts on that,  
8 Mr. Beck?

9 MR. BECK: I don't see a problem with that,  
10 as long as the marshals are okay with it. The Court  
11 has ordered the inspection. So it sounds fine to me.  
12 Obviously, they have reciprocal discovery  
13 obligations, but I don't have any problem with that.

14 THE COURT: Do the marshals have any  
15 problem with that?

16 DEPUTY MICKENDROW: I apologize, Your  
17 Honor. There was a disturbance in the hallway that I  
18 was dealing with. What was the request?

19 THE COURT: Well, they're just going to  
20 turn over some cellphones. I've ordered that those  
21 be produced, rather than the Government having to do  
22 a Brady and Giglio review and the FBI dealing with  
23 it, I just wonder if we can go ahead and have it  
24 produced to the defendants, and let the defendants do  
25 that.

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1                   MR. VILLA: Tablets, Your Honor. You said  
2 cellphones.

3                   THE COURT: I did. And it's tablets.

4                   DEPUTY MICKENDROW: And these tablets are  
5 in the Marshal Service's possession right now?

6                   THE COURT: Well, they're in the prisons.

7                   DEPUTY MICKENDROW: We can accommodate it,  
8 and be able to get those.

9                   MR. CASTELLANO: Those tablets were in the  
10 Marshal Service's custody. They were turned over to  
11 FBI. So they would then go from the FBI to the  
12 defense expert.

13                  MR. BECK: Half of them. Some of them are  
14 still with marshals in Albuquerque. But we will all  
15 work together to coordinate to get them to the  
16 defense so that they can do that.

17                  THE COURT: Okay.

18                  DEPUTY MICKENDROW: I would just put on the  
19 record that I know there is one tablet that we're  
20 searching for. I guess it's been missing since May  
21 of 2017. I have inherited the problem. I'm looking  
22 for it right now, and I'm not sure where it is. I  
23 just want to make it clear we're not trying to keep  
24 that tablet at all. We are searching for that  
25 tablet.

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1                   THE COURT: Okay. All right. Does that  
2 deal with it then, Mr. Villa?

3                   MR. VILLA: I think that deals with it.  
4 But a couple of things is -- it's Mr. Lowry's expert,  
5 just so Mr. Beck knows who to deal with; deal with  
6 Mr. Lowry rather than going through me.

7                   And then, I guess, if there is a missing  
8 tablet from a cooperating defendant who is going to  
9 testify, there may be some more information that the  
10 Government needs to turn over to us.

11                  THE COURT: Mr. Lowry.

12                  MR. LOWRY: Your Honor, I'm just curious of  
13 which tablet, which witness the missing tablet is  
14 associated with. And I just want to make sure that  
15 this request includes the correspondence that was  
16 sent to the jail alerting them about the problem to  
17 begin with.

18                  THE COURT: Mr. Mickendrow, do you know  
19 which tablet it is?

20                  DEPUTY MICKENDROW: If Your Honor would  
21 give me a few minutes, I could get the name of the  
22 defendant that we're looking for his tablet on.

23                  THE COURT: Okay. And do you have any  
24 problem producing correspondence you've had with the  
25 jail, with the detention facilities to try to locate

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1 this?

2 DEPUTY MICKENDROW: I would have to clear  
3 that through my agency. But me personally, no. I've  
4 made several attempts to locate it. So I have no  
5 issue with that. But as long as --

6 THE COURT: Let's do this: I'll  
7 conditionally order that you produce the  
8 correspondence as well as -- that goes along with  
9 this, as well as the tablets themselves, getting the  
10 ones that are in your custody over. If you talk to  
11 your superiors, and they have problems with it, then  
12 we can revisit it. But for the present time let's  
13 plan on that being part of the production.

14 DEPUTY MICKENDROW: Yes, sir.

15 THE COURT: Anything else on that, Mr.  
16 Lowry? Mr. Villa?

17 MR. VILLA: Nothing on that issue.

18 THE COURT: Anything else on your motion?

19 MR. VILLA: I don't have anything else on  
20 the motion. I have a similar discovery request, if  
21 the Court would be so inclined.

22 THE COURT: Okay.

23 MR. VILLA: I was informed by Ms. Armijo,  
24 maybe just a couple days ago -- and you heard Mr.  
25 Castellano tell you a little bit earlier that the two

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1 individuals were saying similar things, that Mr.  
2 Perez admitted to providing pieces from his walker.  
3 And I know that one of them is Timothy Martinez, who  
4 was apparently reinterviewed, or interviewed again a  
5 couple days ago, and made a statement, and I believe  
6 a 302 is being prepared on that. But he's going to  
7 be testifying very soon, I suspect, and we don't have  
8 that.

9 THE COURT: Who is the witness on this?

10 MR. VILLA: Timothy Martinez.

11 THE COURT: Timothy Martinez. Okay.

12 MR. VILLA: So, to the extent, you would  
13 order the Government to produce that 302 immediately,  
14 we would ask you to do that.

15 THE COURT: Your thoughts, Mr. Beck? Ms.  
16 Armijo?

17 MR. BECK: I think we have forthcoming a  
18 number of both Giglio and James productions. So some  
19 more James statements and more Giglio that we just  
20 discovered in preparing for trial with our witnesses.  
21 Those 302s are in the works. I expect that they will  
22 be disclosed Monday to the defendants. So they'll  
23 have all that.

24 THE COURT: Does that work for you, Mr.  
25 Villa?

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1                   MR. VILLA: We'll take Monday, yes, Your  
2 Honor.

3                   THE COURT: Anything else?

4                   MR. VILLA: That's all I have.

5                   THE COURT: Ms. Bhalla, you have issues you  
6 want to raise on your motion?

7                   MS. BHALLA: Thank you, Your Honor.

8                   You know, we've talked a little bit about  
9 the phone calls that were disclosed and the number of  
10 phone calls. And we've all been scrambling to listen  
11 to these phone calls as quickly as possible.

12                  One of the things that we discovered when  
13 listening to the phone calls, and Lupe Urquiza -- I  
14 mean, just honestly within the last week, Your Honor,  
15 Lupe Urquiza made a phone call to his brother. And  
16 in that phone call, and in more than one phone call  
17 he disclosed that Gerald Archuleta, also known as  
18 "Styx," had a wire -- I assume it was one of those  
19 recording devices -- and made recordings of him. And  
20 the Government showed him copies of the transcripts  
21 of those recordings. And that was what was used to  
22 gain his cooperation.

23                  I did reach out to the Government to ask if  
24 we could have those. The Government responded that  
25 they had no recordings or transcripts of that -- of

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1 those conversations. So --

2 THE COURT: They're saying there was no  
3 recordings?

4 MS. BHALLA: They're saying, I think -- and  
5 I may ask the Government to give a better answer --  
6 is that I don't know if they meant that no such  
7 recordings were ever made, or that no such recordings  
8 exist; that they don't have possession of those. I'm  
9 not totally clear.

10 THE COURT: All right. Mr. Beck?

11 MR. BECK: I hope I'm not overstepping my  
12 grounds in revealing intimate trial strategies, but  
13 cooperators and other SNM members lie on phone calls.  
14 So Lupe lied to his brother on a phone call to  
15 justify why he was cooperating. You'll probably see  
16 that again this afternoon in another motion. But he  
17 lied to his brother.

18 THE COURT: But you don't know of any  
19 transcripts?

20 MR. BECK: Yeah, as far as we know -- and I  
21 think this is pretty darn certain -- I don't deal in  
22 certainties -- but Archuleta never recorded Lupe  
23 Urquizo.

24 MS. BHALLA: If that's the case, Your  
25 Honor, this sort of dovetails into Marc Lowry's

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1 motion, which is Document 1701. And I'm going to say  
2 something briefly about that.

3 If it's their position that there were no  
4 recordings, then we want to know whether or not the  
5 Government indicated to Lupe Urquizo that such  
6 recordings existed. Those are, you know, specific  
7 threats or promises that would certainly get into  
8 Giglio material.

9 Now, the Government may say that no such  
10 threats or promises were made. If that's their  
11 position, that's fine. But I think that we are going  
12 to ask for clarification on that, and maybe we deal  
13 with that in -- and I did make a request for that in  
14 number 4 in our supplemental, Your Honor. And maybe  
15 we can deal with that when we get to it.

16 If you want me to go ahead and move on to  
17 number 2, or do you want me to go straight to that  
18 issue?

19 THE COURT: Well, since you brought it up,  
20 we can go ahead and do number 4. You're putting  
21 together a list of all the benefits that the  
22 cooperators are getting; correct, Mr. Beck?

23 MR. BECK: Yes, Your Honor. I think we've  
24 disclosed that.

25 THE COURT: So that covers the promises

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1 side. Do you have any evidence or knowledge that  
2 there were threats to Mr. Urquizo?

3 MR. BECK: Well, I think that -- I mean,  
4 I'm just thinking -- it sounds like they have  
5 evidence that there was. And they may use that in  
6 cross-examination of a couple of folks. I don't know  
7 what else they want from the United States.

8 THE COURT: Well, I guess, here's the thing  
9 is, if there were threats, and then the Government  
10 didn't act on those threats, I guess I would put that  
11 on the side of a benefit. Would you agree with my  
12 analysis, that if you're -- I'm not saying it was Mr.  
13 Acee -- but Mr. Acee is sitting there and he is  
14 making threats, and then he doesn't do those things,  
15 that would seem to be a benefit to the cooperating  
16 witness that ought to go on your list.

17 MR. BECK: I mean, I think if the United  
18 States was targeting someone, and then part of a  
19 cooperator's agreement was that that target would go  
20 away, I think that's been included.

21 I mean, threats -- as Your Honor will hear  
22 this afternoon, and I think Your Honor has heard  
23 before, associates of the SNM include some of the  
24 defendants' wives and girlfriends and mothers who  
25 sent in drugs into the prison. And you'll hear this

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1       in each one of the trials. So that would be  
2       racketeering by SNM. I think it will come out that  
3       the United States targeted folks who they didn't  
4       prosecute. I can't -- I mean, I can't think --

5                     THE COURT: I guess what my solution for  
6       this is that you ask about threats, and if there were  
7       threats, they go on the -- on your list for each  
8       cooperating witness that that's a promise, that's a  
9       benefit. Because if it didn't take place, then I  
10      think that is a benefit.

11                  MR. BECK: Okay.

12                  THE COURT: Does that deal with number 4  
13      then?

14                  MS. BHALLA: It does, Your Honor.

15                  And I would like to point out to the Court  
16      that this did happen with more than one cooperating  
17      witness. We can certainly meet with the Government  
18      and indicate how many we think that that occurred  
19      with, that haven't been disclosed yet. And I think,  
20      Your Honor, that this is going to be a continuing  
21      issue, as we continue listening to the phone calls.  
22      We're doing the best we can to process them, but  
23      there is just a lot of them.

24                  The other issue, Your Honor, on number 2 is  
25      in one of the Lupe Urquiza phone calls he mentions

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1 that Special Agent Acee wanted him to have a  
2 conversation with Mario Rodriguez, and that he was  
3 going to set up a phone call for -- or set up a way  
4 for Mr. Urquizo to be able to speak with Mario  
5 Rodriguez on the phone. We would like documentation,  
6 recordings, whatever the Government has on that  
7 particular issue.

8 THE COURT: Do any recordings or  
9 transcripts of those conversations exist, Mr. Beck?

10 MR. BECK: I apologize. I missed it.

11 THE COURT: This is between Mario Rodriguez  
12 and Mr. Urquizo. I guess Mr. Acee was setting up --  
13 there is some indication in the record that Mr. Acee  
14 set up a phone call between them. I guess the  
15 question is, are there any recordings or transcripts  
16 of the conversation between Mr. Rodriguez and Mr.  
17 Urquizo?

18 MR. BECK: Again, this is just SNM members  
19 lying about what they're doing on the phones. So  
20 that didn't happen.

21 THE COURT: Well, you mean -- so where did  
22 you get this information? Did it come out of a 302?

23 MS. BHALLA: No, Your Honor. Lupe Urquizo  
24 made a phone call to a family member.

25 THE COURT: Oh, okay.

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1 MS. BHALLA: And explained to -- and this  
2 goes into some of what we want in terms of benefits,  
3 it sort of goes into the same category of what we  
4 were dealing with before, Your Honor. But it was a  
5 phone call from September 11th of 2017. And Mr.  
6 Urquizo stated that he -- the more cooperators he  
7 brought in, the more time he got off his sentence.  
8 So the more people that he could get to cooperate for  
9 the Government, the less time he would have to serve.  
10 And in that spirit, he was going to try to gain Mario  
11 Rodriguez' cooperation.

12 THE COURT: But it doesn't sound like the  
13 Government has any record of any call between Mario  
14 Rodriguez and Mr. Urquizo. Is that your position,  
15 Mr. Beck, is you just don't even know about this  
16 call?

17 MR. BECK: That's accurate, Your Honor.

18 THE COURT: All right.

19 MS. BHALLA: And if that's the case, Your  
20 Honor, I think if there is no recording of the  
21 conversation, I think what we would like is -- if  
22 Agent Acee did, in fact, have that conversation with  
23 Lupe Urquizo, and did, in fact, provide a phone to  
24 Lupe Urquizo, or facilitated a phone call --

25 THE COURT: I think Mr. Beck is saying

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1       they don't know anything about it.

2           MS. BHALLA: Nothing?

3           THE COURT: Is that right, Mr. Beck?

4           MR. BECK: That's right, Your Honor.

5           MS. BHALLA: Okay. That's fine, Your  
6       Honor. Thank you.

7           THE COURT: And I guess, just to tie it  
8       down, you don't have any transcript or recording of  
9       this call, because you don't know that the call ever  
10      took place?

11           MR. BECK: That's right, Your Honor.

12           MS. BHALLA: Thank you, Your Honor.

13           And the answer to number 3 may be the same.  
14       When we reviewed these Lupe Urquiza calls, we started  
15       wondering if the cooperators were recording each  
16       other. If there are any recordings between  
17       cooperators, we would like those disclosed.

18           MR. BECK: The only one we have everyone  
19       already knows about; that's when Mario Montoya and  
20       Eric Duran were cooperating during the investigation.  
21       Neither knew that either was cooperating so both  
22       thought that they were recording each other covertly.  
23       That's the only recorded conversation between  
24       cooperators.

25           MS. BHALLA: Okay. Thank you, Your Honor.

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1           The only other thing I'd ask the Court is  
2 we have some sort of deadline imposed for the Giglio  
3 material regarding promises.

4           THE COURT: Are you done with that work, or  
5 is that ongoing?

6           MR. BECK: That's done. It was disclosed.

7           THE COURT: Do you want to do it this way:  
8 Do you want to give Mr. Beck a list of those that you  
9 think there were threats?

10          MS. BHALLA: Yes, we can do that, Your  
11 Honor.

12          THE COURT: Do that. And how long would it  
13 take you after you get that list, Mr. Beck?

14          MR. BECK: There is a lot of the principal  
15 agents and task force officers -- I mean, Special  
16 Agent Acee, obviously, has much of the information.  
17 But a lot of the other agents are out-of-pocket  
18 today, so we may not be able to get that today.

19          THE COURT: Can we put end of business on  
20 Monday?

21          MR. BECK: We can.

22          THE COURT: Does that work for you, Ms.  
23 Bhalla?

24          MS. BHALLA: Yes, Your Honor.

25          And I will do my best to compile a list of

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1 who we think the promises were made to based on our  
2 review of the phone calls. But I would also ask that  
3 if the Government discovers any threats or promises,  
4 or can speak with Agent Acee about that, if anything  
5 that hasn't been disclosed, they disclose it, so that  
6 we're not dealing with this in the middle of trial,  
7 Your Honor, as we continue listening to phone calls.

8 THE COURT: Do you assume --

9 MR. BECK: I understand that's what the  
10 Court already ordered.

11 THE COURT: All right. So they have a  
12 continuing duty to update and supplement if they come  
13 across new evidence.

14 MS. BHALLA: Thank you, Your Honor.

15 THE COURT: Anything else on your motion,  
16 Ms. Bhalla?

17 MS. BHALLA: No, Your Honor.

18 I would just say that I think that Mr.  
19 Lowry's motion also addresses some of these issues.  
20 And I don't -- the arguments sort of complement each  
21 other, Your Honor.

22 THE COURT: Okay. Does anybody else have  
23 anything on those two motions, Mr. Villa's and Ms.  
24 Bhalla's, anything else on those? Were you getting  
25 up to talk, Mr. Villa?

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1 MR. VILLA: I was being summoned by Mr.  
2 Mickendrow.

3 THE COURT: Were you getting up to talk?

4 MS. DUNCAN: I am, Your Honor. It's not in  
5 the motion, but it's related to discovery.

6 THE COURT: Okay.

7 MS. DUNCAN: On January 8, the Court  
8 ordered the Government to review and produce Eric  
9 Duran's medical records to the defense in 11 days.  
10 And we haven't got than yet. So I'm wondering what  
11 the status of those records are.

12 MS. ARMIJO: I believe the Court ordered  
13 Mr. Del Valle to review them in 11 days, and then  
14 provide information to the Court if he needed some  
15 information from the Court. We have not heard back  
16 from Mr. Del Valle, but I will check up. It wasn't  
17 for the Government to review, because --

18 MS. DUNCAN: That's right. It was a  
19 two-step; he was going to review them, tell the  
20 Government what they were, and then we were going to  
21 move forward. So I would say, if Mr. Del Valle  
22 failed to object to anything in those 11 days, I'd  
23 ask the Court to order the Government to turn over  
24 those records in toto today.

25 THE COURT: Well, why don't we do this:

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1 Why don't you put an order together ordering Mr. Del  
 2 Valle -- let's see if we can get him here this  
 3 afternoon, and let's see what the deal is. So I'll  
 4 talk to Ms. Wild here in a little bit, and see if we  
 5 can get him to come over. And maybe that would be  
 6 the best way to deal with it. We'll see if he's  
 7 available.

8 MS. DUNCAN: Okay. Thank you, Your Honor.

9 THE COURT: Maybe y'all have a phone number  
 10 or something, and you can call him, tell him the  
 11 Court wants him over here sometime to talk about  
 12 those medical records, that would be great.

13 All right. Shall we start with the bad  
 14 acts? We want to take Mr. Sanchez' -- Mr. Villa?

15 MR. VILLA: I'm not trying to interrupt Mr.  
 16 Sanchez, but Mr. Mickendrow has some information for  
 17 the Court regarding the missing tablet that probably  
 18 is better for him to just convey that to you. It  
 19 concerns the identity of whose tablet is missing and  
 20 what he's done to locate it and that sort of thing.

21 THE COURT: All right. Deputy Mickendrow,  
 22 do you want to go ahead and put that on the record?

23 DEPUTY MICKENDROW: Yes, Your Honor. I was  
 24 contacted by AUSA -- too many names running through  
 25 my head -- I was contacted by AUSA Armijo regarding

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1 Robert Martinez' tablet, and where the current  
2 location of that tablet is. I wasn't aware that it  
3 had been lost. I found out after that email that the  
4 tablet had went missing sometime back in May of 2017,  
5 when Robert Martinez was at Sandoval County.  
6 Apparently, it had been sent to the Russ Aoki, and  
7 Jennifer Oh for some updates.

8 According to the information that we've  
9 tracked down, Mr. Aoki says that he sent it back to  
10 Sandoval. I've also spoken with Mr. Martinez'  
11 attorney, CJ, and he states that his staff also  
12 looked into it. And Sandoval was stating that it was  
13 sent to PNM. I've reached out to PNM, and the  
14 Marshal Service up in Albuquerque, to inquire if they  
15 can search the offices and the areas, to see if they  
16 can locate that tablet. So we're make endeavors to  
17 locate that tablet.

18 THE COURT: Okay. Anybody got any  
19 questions or additional comments of Deputy  
20 Mickendrow? All right. Thank you, Deputy.

21 DEPUTY MICKENDROW: Just one final note,  
22 Your Honor. I did put up through the chain of  
23 command the request for my emails regarding locating  
24 the tablet. And I just want to be clear that's what  
25 the Court was requesting from me is my correspondence

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1       with reaching out to the different facilities in  
2       attempts to locate that tablet?

3                     THE COURT: Correct.

4                     DEPUTY MICKENDROW: Okay. And I don't have  
5       a response as of yet, but --

6                     THE COURT: Okay. All right. Thank you,  
7       Deputy.

8                     Let me ask the Government, with Del  
9       Valle -- is Eric Duran floating around here?

10                  MS. ARMIJO: Well, I don't want to say  
11       where his whereabouts are. But we could try to make  
12       attempts to get him here. I just texted Mr. Del  
13       Valle. I haven't heard back from him yet.

14                  THE COURT: All right. I don't want you to  
15       disclose if you don't want to, and it's not  
16       necessary. But if he can try to get Mr. Duran here,  
17       so maybe we can cut through these medical records.  
18       If not, I'll take Mr. Del Valle. But it would be  
19       better if his client were here.

20                  All right. Ms. Jacks, were you -- just  
21       standing there?

22                  MR. VILLA: Just making sure, in case I  
23       need to come back. I think that's all I have.

24                  THE COURT: All right. Ms. Jacks, do you  
25       want to begin to tackle the Rule 404(b)?

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1           If I recall where we were is that the  
2 Government produced a long list of bad acts that they  
3 were going to assert. Many of those we ruled could  
4 be used as either res gestae or part of the proof of  
5 enterprise's activity. And then we required the  
6 Government -- y'all can correct me if I'm wrong -- to  
7 come back and see if there was anything that was --  
8 they wanted to try to get under 404(b). And if  
9 they -- and the documents that we had earlier, we  
10 decided that, even though they were labeled as bad  
11 acts, to put defendants on notice, they were not  
12 going to try to use any of that evidence under  
13 404(b).

14           And so then, if they wanted to, they had to  
15 come back and specifically highlight bad acts that  
16 they wanted to get in that they -- that were not  
17 evidence that they were going to use to establish  
18 enterprise or racketeering activity or those things.  
19 And these are the list. These are the ones that now  
20 they're using these under 404(b).

21           Have I now set the stage for these motions,  
22 Ms. Jacks?

23           MS. JACKS: I guess you have. I'm just  
24 confused because they're being called 404(b), but  
25 they're also not 404(b). I don't know. I mean, I

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1       don't know how they're coming in. If they're coming  
2       in as part of the crime, then I wouldn't think they'd  
3       be 404(b). If they're coming in as 404(b), I think  
4       the Government's notice is inadequate, because it  
5       doesn't state the purpose, or link it up in any way  
6       so the Court could make a ruling whether it is or is  
7       not 404(b).

8                     THE COURT: Are these yours,  
9                     Mr. Castellano?

10                  MR. CASTELLANO: They are, Your Honor. And  
11                 this is not 404(b). So the last time we did this, we  
12                 had a longer list of items.

13                  THE COURT: Right.

14                  MR. CASTELLANO: I told the Court this was  
15                 not 404(b) evidence. I think only Christopher Garcia  
16                 had a prior drug act that would be 404(b). So what  
17                 we did is we went through the acts. The Court said  
18                 which ones were fair game. And then by the 22nd of  
19                 January, we were supposed to tell the defense which  
20                 ones we were using. The list before the Court is the  
21                 list that we're using from that longer list. And  
22                 they're not 404(b). They're intrinsic to the crime  
23                 charged.

24                  THE COURT: These are?

25                  MR. CASTELLANO: Yes -- well, they're part

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1 of racketeering activity.

2                   The fourth one is related to the Javier  
3 Molina murder, and the others are all related to SNM  
4 activity, the structure of the organization and  
5 racketeering acts.

6                   THE COURT: So, once again, these are not  
7 being used -- these are not 404(b) as to Mr. Sanchez.  
8 These are bad acts that you think that are res gestae  
9 or part of the proof of racketeering activity?

10                  MR. CASTELLANO: That's correct.

11                  THE COURT: Okay.

12                  MR. CASTELLANO: That's going to be the  
13 same for each of the shorter lists we submitted to  
14 each of the defendants.

15                  THE COURT: All right. Let's take them one  
16 at a time and link them up for me. Do you want to go  
17 first on providing crack cocaine? Do you want to go  
18 first, Ms. Jacks? Or do you want to hear Mr.  
19 Castellano give the justification first as the  
20 proponent of the evidence?

21                  MS. JACKS: I think, based on what Mr.  
22 Castellano just said, I understand number one.

23                  THE COURT: All right.

24                  MS. JACKS: But it has been brought to my  
25 attention that based on plea negotiations with

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1       Mr. Garcia that took place over the past few days,  
2       the Government may have some potentially Brady  
3       information regarding this alleged act.

4                   MR. CASTELLANO: I'm unaware of any Brady  
5       activity related to that act, Your Honor.

6                   MS. JACKS: My understanding, there were  
7       several versions of plea agreements that were  
8       negotiated with Mr. Garcia, in which this act was  
9       actually -- I guess, originally contained in the plea  
10      agreement, and later stricken because Mr. Garcia  
11      apparently provided some information that he was  
12      unaware that this situation did actually not occur.  
13      He did not provide drugs to Mr. Sanchez in 2005.

14                  MR. CASTELLANO: Mr. Garcia is not the  
15      source of that information, Your Honor.

16                  MS. JACKS: But information that would  
17      impeach whatever the source of this information is  
18      would be Brady information.

19                  MR. CASTELLANO: The statement says  
20      Mr. Garcia provided crack cocaine to another person,  
21      who, in turn took the drugs into the facility. So if  
22      Mr. Garcia doesn't know what that person did it --  
23      we're not focusing on Mr. Garcia. We're focusing on  
24      the person who brought them into the facility, and  
25      gave the drugs to Mr. Clark and Mr. Sanchez. So that

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1 is not just focused on Mr. Garcia.

2 THE COURT: I guess I'm having a hard time  
3 seeing how that would be Brady material.

4 MS. JACKS: Maybe I'll file a motion on it.  
5 We can go forward. I mean, I think if during plea  
6 negotiation Mr. Garcia gives information that  
7 undermines the credibility of this assertion in this  
8 first paragraph, that that is favorable evidence to  
9 Mr. Sanchez that should be immediately disclosed to  
10 him by the Government.

11 MR. CASTELLANO: Your Honor, I don't have  
12 that information. If Ms. Jacks can tell us what that  
13 information is, that Mr. Garcia claims related to  
14 this, we might be --

15 THE COURT: So you don't have any knowledge  
16 that during plea negotiations anything was taken out  
17 of the plea agreement?

18 MR. CASTELLANO: I can tell the Court that  
19 a number of versions went back and forth. And I  
20 don't specifically recall what Mr. Garcia said about  
21 it. So I'm asking Ms. Jacks to refresh my  
22 recollection about what exactly that was.

23 MS. JACKS: Well, my understanding is in  
24 one version of the plea agreement that was sent to  
25 Mr. Garcia, this paragraph was contained. And in the

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1 final plea agreement it was not. So I'm assuming  
2 there are marked-up versions and there were  
3 discussions regarding this specific situation.

4 MR. CASTELLANO: We can check for drafts if  
5 they're out there.

6 THE COURT: If that's the case, do you have  
7 any problem producing those?

8 MR. CASTELLANO: No. Mr. Garcia wanted a  
9 few things removed from the factual basis for his own  
10 reasons. So that's --

11 THE COURT: But you'll look at these to see  
12 if this specific allegation was removed?

13 MR. CASTELLANO: Yes. If Mr. Garcia had  
14 something to say through his attorney about that act,  
15 we can do it. But I seriously doubt Mr. Garcia will  
16 know -- he won't claim what the other person said  
17 that other person did when he brought it into the  
18 facility. But we'll look.

19 THE COURT: Okay.

20 MS. JACKS: I would make the same request  
21 as to all plea negotiations with any individual who  
22 has pled. If there are draft plea agreements that  
23 were edited, I think those are fair game for  
discovery to the defense for potential  
25 cross-examination, investigation, impeachment.

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1                   THE COURT: Well, I do think those would  
2 probably fall under Brady, if in fact, things were  
3 taken out.

4                   MR. CASTELLANO: They may not be Brady at  
5 all.

6                   THE COURT: They may not.

7                   MR. CASTELLANO: We may negotiate over  
8 certain facts, and certain things people don't want  
9 to admit in the plea agreement going out to the  
10 public. So there are any number of reasons in plea  
11 negotiations why things might be added or taken away  
12 from documents.

13                  THE COURT: There may be. But if the  
14 defendant was insisting they take out -- I do think  
15 they could fall under Brady. So you may need to  
16 either just produce the drafts or look at them to see  
17 if they could be Brady material.

18                  All right. So on the first one, you're not  
19 contesting the intrinsic nature of that?

20                  MS. JACKS: Well, I understand the theory  
21 of admissibility. It's not 404(b). They're arguing  
22 it's part of racketeering activity. So I do contest  
23 the truth of it. But in terms of the concept, I get  
24 it. And I understand as to paragraph 2. Paragraph 3  
25 I don't understand how that is any sort of evidence

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1 of racketeering activity or res gestae on the  
2 offense.

3 THE COURT: All right. Do you want to hear  
4 from Mr. Castellano, then, first on that?

5 MS. JACKS: Sure.

6 THE COURT: All right. Mr. Castellano?

7 MR. CASTELLANO: Your Honor, you've heard a  
8 long list of bad acts this morning related to the  
9 shackling of the defendants. And so the defense --  
10 or the SNM is constantly exerting its power in the  
11 corrections system. And assaulting correctional  
12 officers is one of those things. Especially if they  
13 feel disrespected. They're not going to take the  
14 disrespect, they're going to respond in kind.

15 THE COURT: How are you going to argue, if  
16 this evidence comes in, that it goes to either  
17 enterprise or to racketeering activity, this  
18 particular incident? How do we know this one was in  
19 furtherance of the enterprise, or was just a beef he  
20 had that day with a correctional officer?

21 MR. CASTELLANO: It's in the opening  
22 statements to each of the indictments that the SNM  
23 exerts its power and authority. And if they don't do  
24 so, they lose respect. And so that's their place in  
25 the prison system. So it's a system ruled by threats

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1 and exertion of power and violence. And that is  
2 contained in the indictment.

3 THE COURT: Well, if we don't have  
4 something more that tells us whether this is related  
5 to SNM activity, I'm going to exclude that bad act.

6 MR. CASTELLANO: Well, Your Honor, I don't  
7 have that report with me. I'll take a look at it.  
8 But the problem is we continue to litigate these  
9 things. The Court has already ruled this was fair  
10 game. The defense objects, and they file another  
11 motion that says I strenuously object. And then  
12 we're talking about it again. The Court has already  
13 ruled. I've already shortened that list. This goes  
14 to the defendants, and now we're taking a second bite  
15 at the apple.

16 I can go back and pull reports, and if I  
17 have evidence to show that it's SNM-related, I'll  
18 move its admission at trial and ask the Court before  
19 I do so.

20 THE COURT: All right. Approach before you  
21 do. And if there is something that you can bring out  
22 that ties it to the SNM, then I'll reconsider. But  
23 right at the moment, let's plan on keeping it out.

24 All right. Do you want to go to number 4?

25 MS. JACKS: No, I'm done. Thank you.

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1                   THE COURT: The rest of them you understand  
2 the theory?

3                   MS. JACKS: I do.

4                   THE COURT: All right. So I'm going to  
5 deny the motion except that one issue, the one issue  
6 of the assault, I'll keep out.

7                   All right. Let's go to Mr. Perez' motion.  
8 I think we now understand with precision what we're  
9 doing here now.

10                  Mr. Villa?

11                  MR. VILLA: Thank you, Judge. So with  
12 respect to the first two, I don't have any idea how  
13 these are related to the SNM or the SNM enterprise.  
14 The information we have from the United States is  
15 that Mr. Perez was allegedly validated in the SNM  
16 sometime in 2009.

17                  The first two acts are crimes, assault, and  
18 resisting arrest, which I believe was a misdemeanor;  
19 the second was an aggravated battery -- I think that  
20 one was misdemeanor, too. They both occurred in Eddy  
21 County on the streets. I've looked at the Bates  
22 numbers that the Government refers to, and they  
23 appear to be -- one incident, Mr. Perez is at a bar,  
24 and he's got a warrant, and a police officer comes to  
25 arrest him and he resists arrest, and has to be

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1 tased. It doesn't say anything at all about any SNM  
2 activity whatsoever.

3 So with respect to the first two, I'd ask  
4 you to exclude those, because I don't think they have  
5 any bearing on the enterprise. And I don't think  
6 there is any evidence that Mr. Perez submitted those  
7 in furtherance of the SNM enterprise.

8 Number 3 is sort of --

9 THE COURT: Let me get Mr. Castellano's  
10 response on the first two. Mr. Castellano?

11 MR. CASTELLANO: I'd like to do the same  
12 thing here, Your Honor, approach first at trial, if  
13 I'm going to move the admission.

14 The officer who tased Mr. Perez grew up  
15 with him, so he may -- I haven't been able to dig  
16 down further into what the officer recalls about Mr.  
17 Perez, and what he knew about him as an SNM member.  
18 But the person who tased him actually knows him very  
19 well, grew up with him. So I will inquire further  
20 and seek to approach first, if I try to introduce  
21 either number 1 or number 2. I think they stem from  
22 the same incident.

23 THE COURT: Because those are pretty early,  
24 as far as Mr. Perez is concerned, are they not?

25 MR. CASTELLANO: I didn't hear Mr. Villa.

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1 Did he say before Mr. Perez was validated, or did he  
2 say before he became a member?

3 MR. VILLA: Well, the information I have is  
4 that he was validated by the STIU in 2009. When he  
5 became a member, I don't know what evidence the  
6 Government intends to put on.

7 But, again, this is something that happened  
8 at a bar in Carlsbad, you know, with an officer  
9 arresting somebody who has a warrant, and that person  
10 resisting arrest. Maybe the officer did know him,  
11 but I don't know what that has to do with the  
12 racketeering.

13 THE COURT: Well, I guess on the present  
14 record, Mr. Castellano is willing to approach the  
15 bench. And if he doesn't have any more evidence than  
16 that, I'd be inclined to exclude it. Does that work  
17 for you?

18 MR. CASTELLANO: It does, Your Honor. And  
19 I will note there is a distinction between when  
20 Corrections validates somebody and when somebody  
21 becomes a member. Those are two different things.

22 THE COURT: That's true. That's true. And  
23 we recognize that as well.

24 MR. COOPER: Excuse me, Your Honor. People  
25 on the phone cannot hear Mr. Castellano.

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1                   THE COURT: Do you want to grab that mic,  
2 Mr. Castellano.

3                   MR. VILLA: And I recognize there is a  
4 difference. But I certainly think, if the Government  
5 is going to approach, they should have some evidence  
6 to put on that Mr. Perez was even potentially a  
7 member of the gang at that point in time, while he's  
8 on the streets of Carlsbad.

9                   And number 3, I guess I'd ask for the same  
10 ruling, Your Honor. What's been provided, referenced  
11 in the Bates number there, is an incident report from  
12 the Corrections Department about Mr. Perez throwing  
13 some food out of his sally port -- or excuse me, the  
14 food port on door, and telling some other inmates to  
15 do that. There is nothing associated with that  
16 discovery that the Government identifies that  
17 suggests this was an SNM-related activity, or done in  
18 furtherance of the SNM, as opposed to something is  
19 that happens in prison maybe every week.

20                  THE COURT: Thoughts on that, Mr.  
21 Castellano?

22                  MR. CASTELLANO: Yes, Your Honor. There  
23 will be testimony by other cooperators that they have  
24 done things like this in the past, once they get  
25 upset -- let's say the SNM gets locked down or they

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1 get disciplined in some way, there is often a  
2 reaction by SNM members to -- basically, to mess with  
3 the corrections officers, and fight back if they  
4 disapprove of anything.

5 So the Court will also hear that members  
6 often use the rules against the corrections officers,  
7 and often do what they can to manipulate the system.  
8 And this is one of the things they do.

9 THE COURT: Focusing on the words "incite  
10 other inmates," were there other inmates -- were  
11 there other SNM members that were in Mr. Perez'  
12 facility or pod, or would that have included other  
13 SNM members?

14 MR. CASTELLANO: I don't have that  
15 information. I gave the Bates stamp number to Mr.  
16 Villa. So the information has been provided to him.  
17 If it's in 2010, I'm assuming it's an SNM pod. But  
18 I'd have to go back and look at that report. But  
19 that was provided to Mr. Villa.

20 THE COURT: I guess I would think, if the  
21 other inmates included SNM members, that would be  
22 enough to allow the Government to bring that one in.  
23 If it doesn't -- and there is no -- if it's just  
24 other inmates, then I lean toward not including it.

25 MR. VILLA: I think that's right, Your

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1 Honor.

2           But I think we have to be a little more  
3 detailed. I think Mr. Castellano just said that  
4 cooperating witnesses will say sometimes, you know,  
5 We were SNM members and sometimes we did that. And  
6 if someone is going to testify to this specific  
7 incident was that or could have been that, or there  
8 is some evidence to suggest that's it, that's fine.  
9 But I think we have to be careful the cooperating  
10 witness saying: We do this stuff sometimes, and then  
11 the Government puts this evidence on without any  
12 information that this specific incident was because  
13 of that. Then I think the Court needs to exclude the  
14 evidence.

15           THE COURT: Well, I think, if Mr. Perez --  
16 if Mr. Castellano establishes that Mr. Perez and the  
17 other inmates that are being talked about include SNM  
18 members, I think that would be enough for me to allow  
19 this to come in.

20           MR. VILLA: I think if there is testimony  
21 of someone with personal knowledge that that's what  
22 was going on at this period of time, I guess I would  
23 just like to hear the foundation that the Government  
24 lays.

25           THE COURT: How is this evidence going to

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1 be presented, Mr. Castellano? Is it --

2 MR. CASTELLANO: I'm not sure. I'd have to  
3 go back and look at that document, Your Honor.

4 THE COURT: It may be a corrections officer  
5 or something?

6 MR. CASTELLANO: Yes. If this is a report  
7 from the New Mexico Corrections Department, it should  
8 be a corrections report. And like I said, Mr. Villa  
9 has the Bates stamp number. I pointed him directly  
10 to the report.

11 THE COURT: But the actual evidence at  
12 trial will be a corrections officer?

13 MR. CASTELLANO: Corrections officer and/or  
14 an SNM Gang member.

15 THE COURT: All right. We'll just have to  
16 maybe ask him what the source of his information is.  
17 But if there is SNM people that are properly included  
18 under "other inmates," I'd be inclined to allow it.  
19 Otherwise, probably keep it out.

20 MR. VILLA: All right.

21 THE COURT: All right. Anything else on  
22 your motion then?

23 MR. VILLA: That's all.

24 THE COURT: Thank you, Mr. Villa.

25 All right. Why don't we take our lunch

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1 break. Be back in about an hour, and see if we can  
2 get a good afternoon done.

3 (The Court stood in recess.)

4 THE COURT: All right. Let's go on the  
5 record. Every client has got a lawyer. Look around  
6 the room, make sure that everybody has got an  
7 attorney.

8 All right. I understand there is a  
9 conflict, potential conflict issue with Mr. Mitchell  
10 having represented Mr. Sanchez. So who should go  
11 first? Do you want to go first, Mr. Jewkes?  
12 Ms. Jacks?

13 Let's wait till Mr. Armenta gets here.

14 (A discussion was held off the record.)

15 THE COURT: All right. Mr. Jewkes,  
16 Ms. Jacks, do you want to explain the issue for me?

17 MR. JEWKES: Yes, Your Honor. The  
18 Government raised the issue that, years ago, Gary  
19 Mitchell, who now represents Jerry Armenta, a  
20 cooperating witness for the Government, represented  
21 Mr. Sanchez for a period of a few years handling  
22 Daniel and Ronald Sanchez' appeal to the state court  
23 in New Mexico, appellate court. And that's why the  
24 Government brought this to the attention of the Court  
25 regarding whether or not there is a conflict of

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1 Mr. Mitchell representing Jerry Armenta.

2 THE COURT: All right. And I understand  
3 that Mr. Sanchez will not waive any conflict?

4 MR. JEWKES: He says he does not want to  
5 waive the conflict -- potential conflict.

6 THE COURT: Have you evaluated in any way  
7 the conflict and determined whether one exists or  
8 not?

9 MR. JEWKES: Yes, Your Honor. Quite  
10 frankly, I don't see a major conflict there.  
11 Although Mr. Sanchez and Mr. Mitchell did have  
12 privileged communications, confidential  
13 communications, where they discussed, I understand,  
14 facets of Mr. Sanchez' life.

15 THE COURT: All right. Anything further,  
16 Mr. Jewkes?

17 MR. JEWKES: No, sir.

18 THE COURT: All right. Thank you,  
19 Mr. Jewkes.

20 Ms. Armijo, I probably should have started  
21 with you. I had forgotten that y'all were raising  
22 this issue.

23 MS. ARMIJO: Your Honor, we did issue -- we  
24 did make defense counsel aware of it years ago,  
25 because we believed that, if anybody feels that they

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1 have a conflict, then they should be the ones to  
2 raise the issue in a timely manner. And that wasn't  
3 done. Our belief was that -- what was told was it  
4 was a nonissue, so to speak.

5 Mr. Sanchez, amazingly, waived the issue as  
6 to the same case that Billy Blackburn represented him  
7 on. And he waived that issue as to Billy Blackburn.  
8 But now, as to Mr. Mitchell, he doesn't want to waive  
9 the issue.

10 I don't believe -- the incident I don't  
11 believe, but I'll let Mr. Mitchell speak to that --  
12 is SNM related. I believe he represented him on  
13 appellate issues. It's nothing that we're going to  
14 be bringing in. So it's our contention that it's not  
15 the same subject matter, so that there is no  
16 overlapping for the Court to decide, much like the  
17 Court made the decision with the Marc Lowry conflict,  
18 we think that this issue is a potential issue to  
19 bring to the Court's attention to make a ruling on  
20 for any 2255 issues. But we don't feel that it is  
21 the same subject matter which would warrant a waiver  
22 from Mr. Sanchez. But I will let Mr. Mitchell speak  
23 on that.

24 THE COURT: All right. Thank you, Ms.  
25 Armijo.

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1                   Mr. Mitchell.

2                   MR. MITCHELL: Good afternoon, Your Honor.

3                   THE COURT: Mr. Mitchell.

4                   MR. MITCHELL: Thank you.

5                   Twenty-three years ago, after Mr. Daniel  
6 Sanchez and his brother, Ronald Sanchez, were  
7 convicted in a jury trial of first degree murder and  
8 attempted first degree murder, I was asked to handle  
9 the appeal, which is a direct appeal to the New  
10 Mexico Supreme Court. I was not the trial attorney.  
11 And in 1994, I was requested to begin that action,  
12 and did by obtaining the record, the pleadings filed  
13 in the district court case, which was out of -- Judge  
14 Pope was the district judge. It was out of Valencia  
15 County. And venue had been changed to Cibola County,  
16 in Grants, where the trial was held.

17                   So, in reviewing the pleadings and  
18 obtaining the record, we perfected a notice of  
19 appeal. For whatever reason, I think I was the one  
20 who ended up filing it. And then, in those days, the  
21 rule hadn't changed, so I did the docketing statement  
22 as well from the record of the trial.

23                   The issues raised centered around the  
24 district attorney's victim advocate's sister sitting  
25 on the jury was one major issue. Another issue was

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1       the demand for an expert witness by the defense.  
2       Even though they didn't have one, they wished to have  
3       one and obtain a continuance. And a third issue was  
4       prosecutorial misconduct during closing argument.  
5       And, of course, a fourth one raised was ineffective  
6       assistance of counsel.

7                   So I took that issue to the Supreme Court,  
8       filed the brief in chief, and filed the reply brief  
9       to the State's answer brief. And in July of 1995,  
10      the New Mexico Supreme Court issued a decision. The  
11      Court can find that at 901 P.2d 1995 -- or I mean,  
12      178 -- or 1995 NMSC 53.

13                  The opinion of the Supreme Court sets forth  
14      the facts in rather good detail. It did not involve  
15      a gang shooting. It involved a fight at a local bar,  
16      and an uncle of Daniel and Ronald's, perhaps being in  
17      that fight, and the repercussions of what took place  
18      with a family named Lovato after that evening.

19                  Their defense rested upon an alibi defense.  
20      And according to the record in this case, they called  
21      a number of witnesses, particularly familial  
22      witnesses, that gave them an alibi. And it went to  
23      the jury. The defense attorneys representing at  
24      trial filed a motion for a new trial which set forth  
25      the major issues, that we ended up litigating before

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1 the Supreme Court.

2 So after 1995, because of the decision,  
3 which gave a pretty subtle hint that perhaps at some  
4 point in time some more evidence would be obtained,  
5 and a writ of habeas corpus filed, another attorney  
6 took that over -- I believe, Mr. Blackburn -- and  
7 that's an issue that you've decided, and that's been  
8 before you already. As I recall, Mr. Blackburn took  
9 that over and handled that writ.

10 I lost contact with everybody after 1995,  
11 when another attorney took over the petition for writ  
12 of habeas corpus. So my last contact in this case,  
13 frankly, I believe was in 1995.

14 I attempted to go back and search my files  
15 to see what contact I had, if any, directly where I  
16 sat down and went over the facts with anybody. But  
17 to be perfectly honest, what I have left in my files  
18 are the appellate pleadings that I did, and the  
19 decision of the Supreme Court, things of that  
20 particular nature, which are on record before the  
21 Supreme Court. That's what I can indicate to the  
22 Court.

23 As to any conversations directly with  
24 either client, I don't have a record one way or the  
25 other. In 1995, it was the year that we switched

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1 everything over to -- in my office -- to computerized  
2 systems, and started to go paperless after that,  
3 except for the hard copies of the files that were  
4 used for court, which we destroy after we've scanned  
5 those files in. This file was not scanned into that  
6 computer system. So that's the big break. So I have  
7 no information one way or the other of any calls, or  
8 any conversation or notes regarding conversations,  
9 nor do I, frankly, recall those conversations.

10 But the opinion of the Supreme Court tracks  
11 what I said in the docketing statement, as it relates  
12 to the facts, and it discusses each issue that I  
13 raised on appeal for both Daniel and Ronald Sanchez.

14 THE COURT: So it was a bar fight and that  
15 was the conviction?

16 MR. MITCHELL: It was. It involved -- I  
17 can tell you by looking at the -- I don't want to get  
18 the uncle's name incorrect. It involved an uncle  
19 that had been at a bar in Los Lunas. Yes, his name  
20 is immaterial at this time, but it did not involve --  
21 these were all young men at the time -- and it did  
22 not involve gang affiliation. It involved, according  
23 to the State's representation, an incident with the  
24 Lovatos at a bar called Red Carpet, where they got  
25 into a fight. And then, according to the State, they

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1 claimed that Ronald and Daniel then came over in a  
2 car -- there was a dispute about the car -- but came  
3 over in a car to the Lovatos' house, and a gunfight  
4 ensued.

5 THE COURT: Did it ever come up -- was  
6 there any discussion -- was there anything to  
7 indicate it was SNM related?

8 MR. MITCHELL: No, sir. There is nothing  
9 in any document that I have with any indication on  
10 that, and there is nothing in the record, and there  
11 is nothing in the Supreme Court decision either.

12 THE COURT: And you don't recall any  
13 conversations with Mr. Sanchez that's not in the  
14 court pleadings or filings?

15 MR. MITCHELL: The facts that I've given, I  
16 do not. That doesn't mean -- I'm not saying they  
17 didn't have it, because I normally talk to my  
18 clients. But, frankly, I just don't recall anything.  
19 This was a -- what I would call a family type  
20 dispute, and, of course, Ronald and Daniel claimed  
21 that they were not there. But the State's witnesses  
22 said otherwise.

23 THE COURT: All right.

24 MR. MITCHELL: I guess I should add that I  
25 have advised my client, Jerry Armenta, of this issue,

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1 and he and I talked about it some time ago, and more  
2 recently. He didn't see a conflict. The Government  
3 knew about this. Mr. Blackburn and I knew about it.

4 The first time I'd seen Daniel again after  
5 1995, I believe, was here in Las Cruces in the first  
6 time we all gathered together in the courtroom. And  
7 he greeted me by just nodding his head and waving,  
8 and I did the same, and that was the extent of it.

9 THE COURT: But you recalled representing  
10 him as soon as you saw his name or saw him in the  
11 courtroom?

12 MR. MITCHELL: No. What happened is, in  
13 the state case -- which most of the attorneys are  
14 familiar with, the way this started out -- I was  
15 representing Mr. Armenta, court-appointed through the  
16 New Mexico Public Defender Department in a murder  
17 case out of Southern New Mexico Penitentiary.

18 And during that time period, part of that  
19 file included an interview of Mr. Daniel Sanchez by  
20 authorities. And in that interview there was nothing  
21 to indicate that he saw or heard anything, even  
22 though he was in the pod and in a particular  
23 position. We had not -- because of the way we were  
24 working on that case, we had not conducted an  
25 interview of him. So at the time, I didn't think too

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1 much about it, although we keep an extensive client  
2 list -- because I do so much work in the criminal  
3 world -- keep an extensive client list. But we had  
4 nine Daniel Sanchezes listed. So at that time, I  
5 didn't give much thought to it, until the federal  
6 case came about, and then, in conversations with the  
7 counsel, I realized I better go back and check and  
8 see if this was the same Daniel Sanchez that I  
9 represented, and indeed it was.

10 THE COURT: But when you made that  
11 realization, you underwent an analysis and determined  
12 that you didn't --

13 MR. MITCHELL: There was no conflict. I  
14 did. I went back and pulled everything I could get  
15 my hands on that we had; reread the Supreme Court  
16 decision; reread my docketing statement, which is  
17 generally what everything stems from; reread the  
18 motion for a new trial that had been filed.

19 And in those days, I don't believe there  
20 was a transcript of that trial. It meant I had to  
21 listen to tapes, which is the way we were doing it in  
22 state court at the time. And if there was a  
23 transcript, I don't have that transcript of that  
24 trial anymore. So I suspect it was tapes,  
25 audiotapes, which is the way I would have done it.

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1           But that's what I was hired for was to  
2 perfect the appeal, which I did.

3           THE COURT: All right. Stand right there,  
4 Mr. Mitchell. And Mr. Sanchez, you need to listen to  
5 your counsel here. They may not want you to speak,  
6 and if they don't, I think they are the ones that  
7 should make that call, but I do give you an  
8 opportunity to say anything that you want to say to  
9 the Court.

10          MS. JACKS: Your Honor, I would like to say  
11 something to the Court.

12          THE COURT: You may.

13          MS. JACKS: I'd like to ask Mr. Mitchell a  
14 few questions.

15          I'll say right from the start, we don't  
16 contest the issue about the homicide, it had nothing  
17 to do with any sort of gang activity, and that was  
18 never our position. So do you want me to ask him  
19 from here?

20          THE COURT: Yeah, direct them to the Court.  
21 And, Mr. Mitchell, if you'll answer the questions.

22          MR. MITCHELL: I certainly shall.

23          MS. JACKS: Mr. Mitchell, during the time  
24 that you represented Mr. Sanchez, was he housed in  
25 New Mexico State Prison?

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1 MR. MITCHELL: I do not know for sure.

2 MS. JACKS: Well, he was convicted of  
3 murder in the State of New Mexico, right?

4 MR. MITCHELL: That's correct.

5 MS. JACKS: Where else would he be housed  
6 but the state prison?

7 MR. MITCHELL: Well, let me point out that  
8 I've done a lot of that work over the years, and  
9 there was a time period when we were transferring  
10 people out of the penitentiary, and making trades  
11 with other states. And I would assume, but I do not  
12 know enough specific facts to remember, but I would  
13 assume he was housed in the New Mexico State  
14 Penitentiary.

15 MS. JACKS: Or some other prison.

16 MR. MITCHELL: Yes. He was in custody.

17 MS. JACKS: He was in custody.

18 MR. MITCHELL: Oh, yes.

19 MS. JACKS: And did you meet and confer  
20 with him on multiple occasions while he was in  
21 custody to discuss his case?

22 MR. MITCHELL: I do not think so. If we  
23 talked, it was one time in person. But this was an  
24 appeal that depended upon the record. As I recall,  
25 certain family members contacted me. And that's the

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1 way I became involved. And in those days, we tried  
2 to make arrangements to visit with one another,  
3 either in person or via the telephone. It was a  
4 little bit more lax in those days, so we could get  
5 more things done than we can today.

6 MS. JACKS: Did you continue to represent  
7 Mr. Sanchez, after the appeal, on the petition for  
8 habeas corpus?

9 MR. MITCHELL: I have nothing in my files  
10 to indicate I continued to represent him. And I  
11 honestly believe that they contacted Mr. Billy  
12 Blackburn, and he did the writ or he worked on that  
13 aspect.

14 MS. JACKS: Mr. Mitchell, do you recall  
15 that, in fact, you did agree to file a habeas  
16 petition for Mr. Sanchez and missed the filing  
17 deadline?

18 MR. MITCHELL: There was no filing deadline  
19 on a writ of habeas corpus in the State of New  
20 Mexico. And there hasn't been ever, not at least  
21 during modern times, a deadline.

22 But talking about a writ of habeas corpus  
23 would not have been unusual for me after we got the  
24 decision from the Supreme Court, because I would have  
25 recommended that they pursue that, and that they file

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1 a petition for writ of habeas corpus because of  
2 language contained in the Supreme Court decision.

3 MS. JACKS: Did you interview witnesses to  
4 the homicide that had not been interviewed by trial  
5 counsel?

6 MR. MITCHELL: I cannot speak to that one  
7 way or the other, because I do not have those  
8 records, and I do not have a personal recollection of  
9 interviewing witnesses. Most of the time, I would  
10 assign an investigator to do that, so that I don't  
11 end up with a conflict with these witnesses. And if  
12 I had an investigator at the time, that would have  
13 been one of two people. And I haven't contacted them  
14 to see if they remember doing -- well, one is  
15 deceased, and the other still works as an  
16 investigator. But I haven't contacted him to see if  
17 he did any work on the case.

18 MS. JACKS: Specifically, Mr. Mitchell, did  
19 a third suspect come to your office and confess to  
20 committing the homicide that Mr. Sanchez and his  
21 brother were convicted of?

22 MR. MITCHELL: I do not recall that, no. I  
23 do not recall that. I mean, if -- frankly, I would  
24 have to rely upon the person that filed the writ,  
25 because if that had occurred, I would have given them

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1       that information, had I had it. I just don't have  
2       enough in the background to tell you one way or the  
3       other.

4                  MS. JACKS: During the time that you  
5       represented Mr. Sanchez, and Mr. Sanchez was in  
6       prison, did Mr. Sanchez ever confer with you about  
7       any sort of incident in the prison where he was  
8       charged with a new case?

9                  MR. MITCHELL: I do not have a recollection  
10      of that. And my files at my office do not reflect  
11      that I represented him again except in this case.

12                 MS. JACKS: Did Mr. Sanchez, in fact,  
13       confer with you and attempt to retain you on a case  
14       filed in Los Lunas, New Mexico, sometime during the  
15       period of your representation of him -- oh, sorry,  
16       Las Cruces -- sometime during the period of your  
17       representation?

18                 MR. MITCHELL: A civil rights action? Was  
19       it a criminal case or a civil rights action?

20                 MS. JACKS: A criminal case.

21                 MR. MITCHELL: He may have or he may not  
22       have. I simply do not have anything in my files to  
23       indicate that. That doesn't mean he didn't talk to  
24       me about it. It means I just don't have any record  
25       of it.

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1 MS. JACKS: I don't have anything further  
2 right now.

3 THE COURT: Anything further, Ms. Jacks?

4 MS. JACKS: No, not right now.

5 THE COURT: Does Mr. Sanchez want to say  
6 anything?

7 MS. JACKS: If I may just have a moment.

8 THE COURT: Certainly.

9 MS. JACKS: I have one more question for  
10 Mr. Mitchell, I'm sorry.

11 Mr. Mitchell, with respect to the habeas, I  
12 asked you about a State filing deadline. Did you  
13 miss a federal filing deadline from the ADPA Act on  
14 Mr. Sanchez' habeas that expired in 1996, one year  
15 after his appeal was over?

16 MR. MITCHELL: I have nothing in the files  
17 to indicate one way or the other.

18 MS. JACKS: And when you stopped  
19 representing Mr. Sanchez, did the representation then  
20 go directly to Mr. Blackburn?

21 MR. MITCHELL: I know Mr. Blackburn took  
22 over representation at some point in time, and I  
23 thought he worked on the habeas. But that's just  
24 from memory.

25 MS. JACKS: And he took the case over from

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1 you?

2 MR. MITCHELL: That's what my memory  
3 reflects. I do not have a file to verify that one  
4 way or the other.

5 MS. JACKS: Thank you.

6 THE COURT: Anything else, Ms. Jacks?

7 MS. JACKS: What I would represent to the  
8 Court, based on my conversations with Mr. Blackburn,  
9 is that Mr. Blackburn took the case over sometime in  
10 2002, and filed the federal habeas in 2002, and he  
11 took that representation over from Mr. Mitchell. So  
12 it's our information that Mr. Mitchell continued to  
13 represent Mr. Sanchez until that time period.

14 The other thing is that one of the claims  
15 in the habeas was, in fact, ineffective assistance of  
16 Mr. Mitchell, based on the fact that the habeas  
17 petition was not filed within one year of the appeal  
18 being finalized, and therefore, missing the  
19 federal -- the new federal deadline under the ADPA.

20 The other thing, is I think during that  
21 time period, Mr. Sanchez' recollection is that he did  
22 confer with Mr. Mitchell during the entire time  
23 period of that representation that lasted well past  
24 1995.

25 And the Court -- all the Court has to do is

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1 look at the indictment in 1613 case, charging the  
2 racketeering conspiracy. There are numerous acts  
3 that are alleged in that indictment regarding prison  
4 misconduct. And, specifically, one of them was  
5 actually filed as a case here in Las Cruces.

6 THE COURT: Well, is there anything in your  
7 mind, though, that indicates that this matter, and  
8 those matters, even if you extended them beyond what  
9 Mr. Mitchell's memory is, are the same matters or  
10 substantially related?

11 MS. JACKS: Well, it's my understanding  
12 that Mr. Sanchez conferred with Mr. Mitchell  
13 regarding certain prison misconduct that is, in fact,  
14 at issue in this -- in the related case, 1613, which  
15 is alleged, at least by the Government, to be SNM  
16 racketeering activity.

17 So I think that's the problem we have. I  
18 mean, every time Mr. Sanchez has done anything wrong  
19 in prison, the Government claims that that's  
20 racketeering activity in furtherance of the SNM  
21 enterprise. And based on the information that  
22 Mr. Jewkes and I have, Mr. Sanchez conferred with Mr.  
23 Mitchell in attorney-client conversations about  
24 certain of that misconduct that is, in fact, alleged  
25 in the indictment.

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1                   THE COURT: Well, that's a little bit  
2 different, though, the question of substantially  
3 related. I mean, it doesn't seem that the matters in  
4 which Mr. Mitchell did testify -- or did represent  
5 Mr. Sanchez are the same or substantially related.

6                   MS. JACKS: Well, if you are talking about  
7 the appeal of the murder case, I would agree with  
8 you. But I also think that, when somebody is  
9 represented by an attorney, and then confers with  
10 that attorney confidentially about representation on  
11 some new matter, that that is protected by  
12 attorney-client privilege, and that is substantially  
13 related, based on what my information is and what the  
14 indictment is.

15                  THE COURT: Well, I think that's a  
16 different test. I mean, whether it's -- there is the  
17 component of confidential information. But I'm  
18 not -- but that's not the same as the substantially  
19 related test.

20                  MS. JACKS: And I agree. And I think  
21 that's for the Court to determine. All I can do is  
22 provide the Court with information about the nature  
23 of the reason that the conflict -- or what Mr.  
24 Sanchez is not going to waive, or what we believe to  
25 be a conflict.

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1                   And to respond to Ms. Armijo's point, Mr.  
2 Sanchez did not have confidential communications with  
3 Mr. Blackburn. And that was why -- and Mr. Blackburn  
4 is not representing a cooperator. And that's why Mr.  
5 Sanchez felt comfortable in waiving that conflict.  
6 But it is a different light with Mr. Mitchell.

7                   THE COURT: All right. Does Mr. Sanchez  
8 want to say anything?

9                   MS. JACKS: No.

10                  THE COURT: All right. Ms. Armijo.

11                  MS. ARMIJO: Your Honor, I guess they're  
12 not contesting that the matter that he represented  
13 him on, from 1992, is not SNM. And there is clearly  
14 a difference of opinion as to the conversations.

15                  But the important thing here, which is  
16 different from the Mike Davis situation, is that that  
17 team -- and Mr. Davis was going to be -- and  
18 initially he said he personally wanted to  
19 cross-examine his former client. In this situation  
20 Mr. Mitchell is not going to be cross-examining Mr.  
21 Sanchez at all. His client has pled. And so there  
22 is no issue as to him using any information he  
23 obtained to cross-examine his former client, because  
24 it's just not going to exist.

25                  But we believe that it's not substantially

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1 related, and also given the fact that his client pled  
2 and is not going to be cross-examining him, that it  
3 is -- that the Court should not excuse Mr. Mitchell.  
4 And additionally -- I guess that's all I have, Your  
5 Honor.

6 THE COURT: All right. Thank you, Ms.  
7 Armijo.

8 Ms. Jacks.

9 MS. JACKS: I just have one thing to add  
10 that I forgot to bring to the Court's attention. I  
11 think there has been some insinuation that somehow  
12 Mr. Sanchez has sat on this, or didn't bring it to  
13 the attention of the prosecution. It's my  
14 recollection -- and I just conferred with  
15 Mr. Jewkes -- that prior to my appointment on this  
16 case, in February of 2016, Mr. Jewkes had brought the  
17 issue to Ms. Armijo, I believe very shortly after the  
18 arraignment in December of 2015.

19 THE COURT: All right.

20 MS. JACKS: So it wasn't brought to the  
21 Court. But the prosecution team was made aware of  
22 situation.

23 THE COURT: All right. Anyone else on this  
24 issue?

25 Well, I'm going to glance at the rules on

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1 confidential information. But it doesn't seem to me  
2 that they are the same matters -- that Mr. Mitchell  
3 did not represent Mr. Sanchez on the same matter or  
4 matters that he's representing Mr. Armenta. And they  
5 don't seem to be substantially related.

6 I'll have to look at the confidential  
7 information prong of that. But it seems to me that  
8 we're not in any danger of Mr. Mitchell using any  
9 confidential information in an unfair way, or any way  
10 that would prejudice Mr. Sanchez, because he simply  
11 doesn't, at the present time, have any of that  
12 information. He's not going to be cross-examining  
13 him. So it's hard to imagine a situation where Mr.  
14 Sanchez would be prejudiced.

15 So at the present time, I'm going to deny  
16 any request to disqualify Mr. Mitchell. I'll take a  
17 little bit of look at the rules on the confidential  
18 information side, but I think that my analysis will  
19 be sufficient to satisfy that prong.

20 I do want to engage in a colloquy with Mr.  
21 Armenta to make sure that he doesn't have concerns.  
22 So, Mr. Armenta, I'm going to ask you some questions  
23 here to make sure that you're comfortable with Mr.  
24 Mitchell continuing to represent you. Do you  
25 understand that you have a right to a conflict-free

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1       counsel? By that I mean that you have a right to a  
2       counsel that represents only you, doesn't have any  
3       divided loyalty, or anything that would keep him from  
4       being a fully zealous advocate for you?

5             THE DEFENDANT: Yes, I do. I understand.

6             THE COURT: And do you understand, you've  
7       listened here in the courtroom to the facts  
8       surrounding Mr. Mitchell's previous representation of  
9       Mr. Sanchez, which I've determined was in an  
10      unrelated criminal case. Do you understand all those  
11      facts?

12            MR. ARMENTA: Yes, sir.

13            THE COURT: Is there anything you need to  
14      talk or find out or ask about to make an informed  
15      decision about what that prior case was?

16            MR. ARMENTA: No, I do not. I don't see  
17      any conflict or anything that would get in the way  
18      there.

19            THE COURT: All right. But you understand  
20      Mr. Mitchell's prior representation of Mr. Sanchez?

21            MR. ARMENTA: Yes.

22            THE COURT: And do you understand that Mr.  
23      Mitchell may have duties of loyalty stemming from his  
24      previous representation of Mr. Sanchez? I mean, he  
25      was a former client, so he has some duties of loyalty

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1 to him?

2 MR. ARMENTA: Yes, I do. I understand.

3 THE COURT: And do you understand that Mr.  
4 Mitchell's duties to Mr. Sanchez may impact -- I  
5 don't see how they would at the present time, but we  
6 don't know how things develop -- may impact his  
7 representation of you, should he recall some  
8 pertinent information that he learned during the  
9 course of his representation of Mr. Sanchez; do you  
10 understand that something like that could happen?

11 MR. ARMENTA: Yes, sir.

12 THE COURT: And do you understand there is  
13 a risk that Mr. Mitchell will have to choose at that  
14 time between his loyalty to Mr. Sanchez and his duty  
15 to zealously advocate for you? He may have to make a  
16 decision if something pops up in his head or some  
17 information comes to the attention of the Court.

18 MR. ARMENTA: I understand.

19 THE COURT: And if Mr. -- I'm trying to  
20 think of any scenario here. There is not going to be  
21 a point where I can see that Mr. Mitchell may be  
22 forced to cross-examine Mr. Sanchez. But if, for  
23 some unforeseen reason that scenario occurred, do you  
24 understand his duty of loyalty to Mr. Sanchez might  
25 affect his performance on your behalf?

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1 MR. ARMENTA: Yes, sir, I do.

2 THE COURT: Additionally, Mr. Mitchell's  
3 duty to Mr. Sanchez may affect some strategies,  
4 arguments regarding relative culpability, or  
5 something like that. I'm just trying to think  
6 through with you how it could come about. Do you  
7 understand that something like that could come about?

8 MR. ARMENTA: Yes, sir.

9 THE COURT: Mr. Mitchell, I had floating  
10 around a waiver, a written waiver. Do you have that  
11 waiver? Has anybody given you a copy of it?

12 MR. MITCHELL: I do not have that waiver.  
13 I can obtain one or procure one myself.

14 THE COURT: Several have the waiver that I  
15 used here, and they're on file. Maybe Ms. Standridge  
16 can dig one up before you leave, and you can go over  
17 it and have Mr. Armenta sign it.

18 MR. MITCHELL: Yes, sir.

19 THE COURT: Mr. Armenta, knowing that a  
20 conflict may arise in the future, and the risk  
21 associated with such a conflict, do you still wish to  
22 waive that conflict and continue with Mr. Mitchell as  
23 your attorney?

24 MR. ARMENTA: Yes, I do.

25 THE COURT: So the form that I'll ask you

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1 to look at is going to basically say that. And, if  
2 you agree that's the case, if you'll sign that  
3 document, and Mr. Mitchell will then file it with the  
4 Court. Okay?

5 MR. ARMENTA: Okay.

6 THE COURT: All right. Anything else on  
7 that matter? All right. Thank you, Mr. Mitchell.

8 MR. MITCHELL: Thank you, Your Honor.

9 THE COURT: All right. I think we were  
10 about to take up the motion in limine to exclude  
11 purported 404(b) evidence that Mr. Herrera had filed.  
12 And I believe that is two incidents. I don't have  
13 the letter, but it's in the body of the motion.

14 Mr. Maynard, are you going to argue these?

15 MR. MAYNARD: Yes, Your Honor.

16 THE COURT: All right.

17 MR. MAYNARD: And I think that the issues  
18 are similar to another motion that was heard just a  
19 while ago --

20 THE COURT: Okay.

21 MR. MAYNARD: -- this morning.

22 First of all, the letter, the notice that  
23 we got from the Government the other day referred to  
24 bad acts. It didn't say specifically 404(b). But  
25 since it just said generically bad acts in the motion

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1       that I drafted, and that was filed, I referred to  
2       404(b).

3                   THE COURT: It looks like they're saying  
4       they're not coming under 404(b). They're going to  
5       use this evidence to prove racketeering activity and  
6       enterprise.

7                   MR. MAYNARD: From what I was hearing this  
8       morning, and in thinking about it, I'm thinking  
9       that's the theory. I'm not sure. And that can be  
10      clarified this morning. But it involves an act --  
11      alleged possession of a shank, and assault on a  
12      corrections officer in 2006 -- which is about eight  
13      years before the charged offense -- and attempting to  
14      introduce drugs into the prison facility in 2011.

15                  And attached to the notice that we received  
16      from the Government pursuant to our earlier request  
17      for notes -- and of course, this was discussed in  
18      December at another juncture, when there was a long  
19      list. The Government responded with a shorter list.  
20      And it was accompanied by documentation from the  
21      Department of Corrections. And from my review of the  
22      documentation, I don't see any connection or mention  
23      of the words or initials Syndicato de Nuevo Mexico,  
24      or SNM. And I just don't see how this could be  
25      shown -- I don't see any showing of foundation that

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1 it's an enterprise act. So it's that issue again.

2 THE COURT: Mr. Castellano, do you want to  
3 address those two?

4 MR. CASTELLANO: Yes, Your Honor. Let me  
5 find the specifics here. That particular act, if I  
6 recall correctly, the corrections officer opens up  
7 the -- I think the food port, and Mr. Herrera strikes  
8 out at the corrections officer, and ends up cutting  
9 the officer on the leg, which would be consistent  
10 with our theory about violence in the SNM and  
11 corrections officers.

12 But also on the paperwork there is an  
13 indication that the advocate for Mr. Herrera on that  
14 incident was Robert Martinez, who is an SNM Gang  
15 member. So usually in the Corrections Department,  
16 when there is disciplinary action, the inmates can  
17 have an advocate for them. There is another inmate  
18 who, in essence, serves as an attorney to represent  
19 them. And in that case, he picked another gang  
20 member who was Robert Martinez, also known as "Baby  
21 Rob." So there is another tie there regarding the  
22 SNM.

23 In addition, I think, if I recall  
24 correctly, Mr. Martinez and Mr. Herrera, on another  
25 occasion, agreed to assault corrections officers.

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1 They spoke together, and each one said, I'll assault  
2 one, you assault the other one. And that's an  
3 occasion different from the one on June 30th of 2006.  
4 So they knew each other. They associated together.  
5 And on another occasion agreed to assault corrections  
6 officers.

7 THE COURT: Well, I guess I would be  
8 inclined to let you bring out the -- the  
9 representation by an SNM Gang member was number 1, or  
10 was that number 2?

11 MR. CASTELLANO: That was the first one.  
12 So the June 30, 2006 allegation regarding possession  
13 of shanks, I believe Mr. Herrera had shanks under his  
14 desk, and hidden in his shoes.

15 And the other issue was shanks in the SNM,  
16 is that they were routinely required or expected to  
17 carry shanks in order to basically do battle; either  
18 defend themselves or attack other inmates. So it is  
19 not unexpected that SNM Gang members would have  
20 shanks.

21 And then, in that same incident, he elected  
22 to have Mr. Martinez serve as his advocate. I can  
23 tell from the paperwork it looks like Mr. Herrera may  
24 have waived the hearing. So I don't believe that Mr.  
25 Martinez actually ever did show up as an advocate,

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1 because I think the disciplinary hearings were  
2 waived.

3                   But then there is -- on another occasion  
4 those two were together and each agreed to assaults,  
5 assault a corrections officer.

6                   MR. MAYNARD: If I may --

7                   THE COURT: Yeah, it sounds like that might  
8 be enough for this to come in, if they're going to  
9 get that evidence in that all SNM members are  
10 required to carry a shank.

11                  MR. MAYNARD: Well, now, there is a big  
12 leap in terms of some implications or inferences to  
13 be made from that allegation. And I don't see a  
14 showing in this particular case that the possession  
15 of the shank was an SNM activity on his part.

16                  What I am hearing is that the bad act, or  
17 rather the enterprise act, was choosing another gang  
18 member to be representing him. That is another  
19 stretch entirely, and brings in, by reference, a bad  
20 act that is probably not an SNM activity. I mean, I  
21 haven't yet heard this theory. And it may come out  
22 in testimony, I guess, if the Court allows it. But  
23 is it an SNM activity or an enterprise activity to  
24 have another member of the SNM or a member of the SNM  
25 to represent you in a disciplinary proceeding? I

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1 think not.

2 THE COURT: Well, it may just show  
3 membership, how they work together, those things. I  
4 think it might be marginal evidence of that.

5 MR. MAYNARD: But it is going to make it  
6 difficult to put in the enterprise act of having an  
7 SNM member represent you, without making reference to  
8 the alleged bad act, bad enterprise act.

9 THE COURT: I well, I guess I'm inclined to  
10 think that if the Government is going to put on  
11 evidence that everybody is required to carry a shank,  
12 and there is evidence that Mr. Herrera carried a  
13 shank, that that's enough for that evidence to come  
14 in, that incident.

15 MR. MAYNARD: Now, I know this is territory  
16 for cross, arguably, but does that mean if he doesn't  
17 have a shank, he's not a member? I mean, that's a  
18 very broad claim on the part of the Government.

19 THE COURT: All right. Do you want to talk  
20 about the second incident any?

21 MR. MAYNARD: That involves allegations of  
22 introducing drugs into the facility. Again, I don't  
23 have any information from the specifics that were  
24 disclosed, that is the Department of Corrections'  
25 documentation that accompanied that disciplinary

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1 proceeding, that it was gang related.

2 And, again, this is getting very slippery  
3 here, where the Government is going to allege,  
4 without a clear foundation, I believe, that every  
5 time a bad act is committed, there is a clear green  
6 light to make the inference that it's a gang  
7 activity. But I'm in the dark about the connection.

8 THE COURT: Well, I think they're going to  
9 prove that's a major activity of the SNM members is  
10 their drug activity. So I'm going to allow those two  
11 occurrences, the Government to prove those up.

12 MR. MAYNARD: Your Honor, I would just ask  
13 that the Court insist on a foundation before the  
14 evidence of the acts themselves start to occur.

15 THE COURT: All right. Lay some foundation  
16 for them. But I'm inclined to allow them, if you  
17 represented accurately what you're going to do with  
18 them.

19 MR. CASTELLANO: We will, Your Honor.

20 And as a preview for the Court, Carlos  
21 Herrera was known be someone who could bring drugs  
22 into the facilities. And one of the people who  
23 helped him bring drugs in was his mother. She was  
24 known to many gang members to be somebody who would  
25 help supply the gang with drugs. And on this

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1 occasion, his mother was implicated at the facility.  
2 So she was also there at the time. So it's  
3 consistent with what other people will say about Mr.  
4 Herrera bringing drugs in for the organization, and  
5 his mother also being involved.

6 In addition, in the bad acts I mentioned  
7 earlier regarding Mr. Baca, he, himself, comments  
8 that another member owed Mr. Herrera \$800 for drugs.  
9 And in that conversation he's identified as "Lazy,"  
10 his a/k/a in this case. So Mr. Baca himself also  
11 acknowledges that Mr. Herrera is somebody to whom  
12 others owe money for drug dealings. That would be  
13 corroborated through a foundation, and as well as  
14 through other evidence in the case.

15 THE COURT: All right. Well, I'm inclined  
16 to deny the motion to exclude the incidences as to  
17 Mr. Herrera.

18 MR. MAYNARD: Your Honor, would the Court  
19 at least ask that the Government approach the bench  
20 before actually going into this chapter?

21 THE COURT: Do you have any problem with  
22 that, Mr. Castellano?

23 MR. CASTELLANO: No, I don't think so. But  
24 the issue may be the order of presentation of  
25 witnesses. I need to see where this witness is. It

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1 may actually be backwards. But we can approach  
2 first. But it may be that the other witnesses later  
3 confirm that Mr. Herrera is responsible for drug  
4 dealing on behalf of the enterprise. But we can  
5 certainly try to approach first.

6 THE COURT: All right. I'm inclined to let  
7 them in. So the Government can approach, but I've  
8 seen and heard enough evidence here to think that  
9 that evidence should come in.

10 All right. It's not next on the list, but  
11 I think that the next -- the last 404(b) is Mr.  
12 Baca's. Do you want to go ahead and tackle that one,  
13 Ms. Duncan?

14 MS. DUNCAN: Thank you, Your Honor.

15 THE COURT: Some of these look much more  
16 tied to SNM activities, and there are some here that  
17 you're not contesting and others that you are.

18 MS. DUNCAN: So, yes, Your Honor, so we  
19 deny all of them. But for purposes of today, we're  
20 objecting to just a handful.

21 THE COURT: Okay.

22 MS. DUNCAN: The very first one we object  
23 to this, as relates to a murder for which Mr. Baca  
24 was convicted in 1989. The Government's letter  
25 suggests that it was Mr. Baca, another SNM Gang

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1 member, who murdered another inmate. That's not what  
2 the evidence shows at all, Your Honor. It shows that  
3 Mr. Baca and another person were accused of killing  
4 an inmate. That other person was acquitted of the  
5 crime. There is no evidence that it was at all gang  
6 related. It appears to have been a disrespect issue,  
7 and may have even been in self-defense, according to  
8 some of the Government's own witnesses. So this is  
9 horribly prejudicial because it's a prior murder  
10 conviction. And it has no connection to any of the  
11 charges here. So this is really pure 404(b)  
12 evidence, not substantive evidence, and it should be  
13 excluded.

14 THE COURT: Mr. Castellano, are you going  
15 to be able to tie both Mr. Baca and the other  
16 defendant to the SNM Gang on this?

17 MR. CASTELLANO: I'm less sure about the  
18 other inmate. I think we can tie Mr. Baca into it.  
19 He actually has a conversation with Eric Duran on the  
20 recordings where he admits to the murder, and lays it  
21 out. So it's actually an admission by him, where  
22 he's telling another SNM Gang member about the prior  
23 murder.

24 And going back to something I didn't cover  
25 with Mr. Herrera, because we moved past it. But "an

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1 association-in-fact enterprise requires a purpose,  
2 relationships among those associated with the  
3 enterprise, and longevity sufficient to permit the  
4 associates to pursue the enterprise's purpose." So  
5 it's important to note people tell certain people in  
6 the SNM, who are other members, about things they've  
7 said and done before. So that goes to the  
8 relationship among those associated with the  
9 enterprise. And the age of the conduct also helps to  
10 establish the longevity of the enterprise sufficient  
11 for them to pursue their purposes.

12 So there are at least two parts of an  
13 association-in-fact enterprise that are covered by  
14 this type of conduct.

15 THE COURT: Well, going back to the Baca  
16 1989 murder, what evidence are you going to have that  
17 ties this to the gang and its activities?

18 MR. CASTELLANO: I have to go back and look  
19 more closely at it. But one of them includes  
20 disrespect by itself. Respect is a big deal in  
21 prison. It's a big deal with the SNM. And it's not  
22 uncommon for people to disrespect others and suffer  
23 the consequences for it. And even if it was merely  
24 about disrespect, this is one gang member telling  
25 another gang member that someone disrespected him,

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1 and he killed him over it. So that would certainly  
2 be covered there.

3 And, once again, in terms of membership  
4 among those in the enterprise, this is a conversation  
5 between two SNM Gang members about prior acts of  
6 violence.

7 THE COURT: Well, if there was no other  
8 proof by the Government other than the conversation  
9 that Mr. Baca had, so it's not tied to a specific  
10 incident, dates or times, other than what Mr. Baca  
11 said, do you have any problem with that?

12 MS. DUNCAN: Absolutely, Your Honor. I  
13 think bringing in irrelevant evidence of a murder  
14 that Mr. Baca was found guilty of, is horribly  
15 prejudicial. And it has no relevance to anything in  
16 this case. I've read through that conversation. He  
17 does talk about it. He's been convicted of it. And  
18 it has nothing to do with the SNM. It has nothing to  
19 do with the allegations here. So, yeah, absolutely,  
20 it should not be admitted. It's just pure 404(b) to  
21 show that he's a violent person.

22 THE COURT: Well, do you need to refresh  
23 your file to see if there is any more here to tie it  
24 to the SNM? Because I'm just not hearing it at the  
25 present time. If it was two SNM Gang members, I

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1       might be inclined to allow it. But it seems that he  
2       may be backing off of saying it was another SNM Gang  
3       member that did it with him.

4                  Let's keep it out at the present time. If  
5       you come back with stronger evidence showing the tie,  
6       I'll take another look at it. But right now, I don't  
7       have a lot to link it up with SNM.

8                  MR. CASTELLANO: We'll approach first, Your  
9       Honor. We will revisit that issue. Mr. Beck  
10      believes maybe some of the witnesses he spoke to know  
11      that to be an SNM hit. But we will approach first.  
12      I understand the nature of this. But, of course, a  
13      murder is racketeering activity. So if we can tie it  
14      to the SNM, we'll bring that up with the Court.

15                 THE COURT: I think if you've got witnesses  
16      that say it's an SNM hit, I'll probably allow it.

17                 MS. DUNCAN: Your Honor, so far, that  
18      evidence has not been disclosed to us. I would just  
19      note that Mr. Lowry and I have the transcripts from  
20      Mr. Baca's trial, and there is no mention of gang  
21      activity. There is no mention of the SNM. We talked  
22      to Mr. Baca's trial counsel. She said there was no  
23      evidence or mention of the SNM. That wasn't the  
24      prosecution's theory. The prosecution's theory was  
25      it was just a prison murder over disrespect and

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1 drugs.

2 THE COURT: Do you know about this other  
3 fellow, this other inmate? Was he an SNM Gang  
4 member?

5 MS. DUNCAN: I do not believe that he was,  
6 Your Honor. I don't know if he became one later.  
7 But I think at the time he was not. And as I  
8 mentioned before, he was acquitted of this particular  
9 crime.

10 THE COURT: Well, we'll keep it out at the  
11 present time. But I indicated what kind of evidence  
12 I'm looking for to get it in.

13 MS. DUNCAN: Your Honor, we also challenge  
14 admission of the second paragraph. This is an  
15 allegation that, in 2009, Mr. Baca possessed heroin.  
16 The reports that were disclosed to support this are  
17 reports of law enforcement who say that they found  
18 Mr. Baca in his cell incoherent, and appeared to be  
19 under the influence of heroin. This evidence has no  
20 relevance to a fact in dispute in this case. Again,  
21 it's just intended to portray Mr. Baca as a bad  
22 person, as someone who uses drugs. This has nothing  
23 to do with the SNM or the charges. So we'd ask you  
24 exclude it.

25 THE COURT: Is there evidence that's

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1 clearly coming that is going to show Mr. Baca's drug  
2 use?

3 MS. DUNCAN: There is another allegation  
4 here in the Government's 404(b) letter about his drug  
5 use. I think it's actually the very next paragraph.  
6 So, on December 15, 2009, that he possessed heroin,  
7 and on December 28, 2009 that he possessed heroin,  
8 and attempted to destroy it. So his use of heroin or  
9 being under the influence of heroin -- so five years  
10 before any of the acts alleged in this case just has  
11 no relevance, and those acts are not alleged to be  
12 drug-related, so this is just pure bad acts.

13 THE COURT: Well, I guess I get a little  
14 concerned about a sanitized view of Mr. Baca that  
15 doesn't tell the jury in one form or another of his  
16 drug use.

17 MS. DUNCAN: My point about his drug use --  
18 if he was testifying, and he was using drugs at the  
19 time when he was testifying, I could see that as  
20 being relevant. But the fact that he used heroin  
21 five years before any of the charged conduct in this  
22 case, it's not relevant. And all it does is  
23 prejudice the jury against Mr. Baca.

24 THE COURT: Well, so much of the SNM Gang  
25 activity is drug related. To not have any evidence

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1 that he used or possessed drugs concerns me some.

2 MS. DUNCAN: But I think this evidence  
3 isn't that he was dealing drugs for the SNM. This is  
4 just evidence that Mr. Baca was found under the  
5 influence of heroin. So I understand the point that  
6 Your Honor is making, but it's not relevant to a fact  
7 at issue in the case.

8 THE COURT: Mr. Castellano.

9 MR. CASTELLANO: I'm looking at the defense  
10 filing. If you'll give me one second, Your Honor.

11 THE COURT: Sure.

12 MR. CASTELLANO: I believe the defense  
13 itself is going to make his drug use relevant. I'll  
14 return to this in a second. But in their filing  
15 where they wanted us this morning to disclose certain  
16 CIs in Document 1673-3, I think one of their defenses  
17 is that people were trying to kill Mr. Baca, and  
18 therefore maybe he was or wasn't a leader. But in  
19 that document it says that people complained about  
20 him, because they thought all he was concerned about  
21 was getting high. And so in terms of his leader and  
22 other people's views of him as a leader, his drug  
23 issue was certainly an issue, and had to do with the  
24 power struggles from time to time when people  
25 criticized him. So that would be an issue that I

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1 think the defense themselves are going to raise.

2 Going back to the December 28, 2009  
3 possession of heroin. On that occasion, what  
4 happened was Mr. Baca, I think, was in his cell. The  
5 corrections officers were going to confiscate  
6 materials. And I believe it was three other SNM Gang  
7 members were starting to run interference for Mr.  
8 Baca. And it was obstructing. He told them to stand  
9 down because it wasn't worth it and they all  
10 complied. So this is an issue where he's about to  
11 get busted by COs, other SNM members run interference  
12 for him, and then they follow his orders to stand  
13 down.

14 THE COURT: This incident, this drug --

15 MR. CASTELLANO: Yes. December 2009, I  
16 believe, is the incident.

17 And the other issue with drugs in prison is  
18 that the SNM largely controlled the drug trade in  
19 prison. So if you had substances or a large amount  
20 of substances, it often reflected that you had access  
21 to drugs. And many times for those who brought drugs  
22 in, they were expected to give a cut of those drugs  
23 to higher ups in the organization.

24 THE COURT: Well, it seems to me that one  
25 probably ought to come in. I may not allow them to

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1 bring in the other one, unless it's as robust with  
2 SNM connections as that one. But it seems that one  
3 probably ought to be allowed to come in.

4 MS. DUNCAN: Your Honor, I just would like  
5 to clarify. I think the Government is putting too  
6 much weight on that second incident. The reports  
7 indicate that Mr. Baca was getting busted, and other  
8 inmates came in, and Mr. Baca was telling other  
9 inmates, "Back off, don't touch the officer; leave  
10 the officer alone." So I don't know how that's  
11 evidence of gang membership or leadership, that he's  
12 telling people to stop -- you know, to not harm or  
13 interfere with the correctional officer. So I don't  
14 think the evidence can support the weight that the  
15 Government is putting on it. But, you know, it is  
16 very prejudicial to Mr. Baca given that marginal  
17 probative value.

18 THE COURT: All right. I'm inclined to  
19 allow that one.

20 What's your next one? Which one, Mr.  
21 Castellano, is the one that you just described where  
22 he told them to back off? Was it the 28th or was it  
23 the 15th?

24 MR. CASTELLANO: That's the December 28,  
25 2009 incident, and the December 15, 2009. I believe

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1       Billy Cordova was one of the other people who was  
2       there and suspected of using drugs. So that was,  
3       once again, another SNM Gang member.

4                  THE COURT: If you don't have the  
5       robustness on number 2, let's take 2 out, and let's  
6       do 3. That will make your point. All right.

7                  MS. DUNCAN: The next one we challenge,  
8       Your Honor, is number 5. This is the allegation.  
9       This is taken from a recording between Mr. Baca and  
10      Eric Duran regarding -- some people wanted to hit an  
11      inmate named KS for a variety of reasons. They were  
12      talking about other inmates protecting KS, and sort  
13      of offering -- Mr. Duran and Mr. Baca offering  
14      opinions about it. The Government characterizes it  
15      as Anthony Ray Baca said he wanted KS hit because he  
16      was a suspected informant. I think that, again, is  
17      put too strongly. This evidence is really  
18      prejudicial, and it's not incredibly probative.  
19      Because it's two people talking about something that  
20      didn't happen, offering opinions about the merits of  
21      it. So we would ask the Court to exclude it.

22                  THE COURT: Mr. Castellano?

23                  MR. CASTELLANO: It is probative. There is  
24      talk of informants and hits and drug debts. Those  
25      are all SNM activity.

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1           It also identifies Mr. Herrera, as I stated  
2 earlier, as somebody who is owed a drug debt for as  
3 much as possibly \$800, which is no small amount in  
4 prison. And so all of that would be clearly  
5 relevant. It would also refer to racketeering  
6 activity, because any murders or attempts to murder  
7 or conspiracies to murder would be racketeering  
8 activity, in addition to drug trafficking.

9           THE COURT: Well, I guess I'm inclined to  
10 agree that has enough of connection to the  
11 Government's story of the SNM Gang to allow that. So  
12 I'll overrule objection to it.

13           MS. DUNCAN: The next is paragraph 6. This  
14 is again, from a recording of Mr. Baca with Eric  
15 Duran. And in that recording Mr. Baca is talking  
16 about an incident where Benjamin Clark, who is one of  
17 the Government's witnesses, wanted to get at another  
18 inmate whose name is "Scooby." And so Benjamin Clark  
19 was supposed to send Suboxone into the next pod, and  
20 he expected "Scooby" to get it. So he was going to  
21 pass it under the door, and "Scooby" was supposed to  
22 pick it up. Instead of "Scooby," it was this guy  
23 name "Psycho." "Psycho" takes the Suboxone, hands it  
24 off to someone other than Mr. Baca. It turns out  
25 that there wasn't enough Suboxone in the envelope for

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1 everyone. So, ultimately, this person, "Psycho,"  
 2 gets hit. I think he got cut, or his throat was cut  
 3 by someone else. So Mr. Baca is simply relaying this  
 4 story to Mr. Duran. It's not Mr. Baca ordering this.  
 5 This wasn't Mr. Baca's drugs. I mean, he's just  
 6 telling Duran something that happened in prison. But  
 7 it's a prejudicial story. It doesn't have any  
 8 relevance to things that Mr. Baca did, other than  
 9 witness this and tell the story. So we'd ask the  
 10 Court to exclude it. This is really a prior bad act  
 11 for Benjamin Clark, not for Anthony Ray Baca.

12 THE COURT: Well, then how does it hurt  
 13 you?

14 MS. DUNCAN: I think it's a violent story.  
 15 I mean, it's Mr. Baca relaying this violent story.  
 16 It has no probative value, but it's linking him to  
 17 violence in an unfair way.

18 THE COURT: Mr. Castellano.

19 MR. CASTELLANO: Mr. Baca is laying out the  
 20 rules of the game. Here we have an issue where one  
 21 gang member, Mr. Clark, is giving drugs to Mr. Baca,  
 22 which is Suboxone. That alone is relevant. And then  
 23 when the drugs are short, there is a dispute, and one  
 24 member hits another member. So this is violence  
 25 within the gang. It shows a dispute over drugs. And

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1 it also reflects a violation of the rules. And  
2 because somebody had been shorted, there were  
3 consequences for that action. So that is a  
4 reflection of the SNM Gang.

5 THE COURT: Well, I tend to agree. It  
6 looks to me like it's connected to enterprise  
7 activities and to racketeering activities.

8 MS. DUNCAN: I think by people other than  
9 Mr. Baca, Your Honor.

10 And I would also note that at the very  
11 beginning of this Mr. Baca tells Mr. Duran that he  
12 thought this was all for nothing; that this was a  
13 great injustice that was perpetrated on "Psycho"  
14 because of the lies or the manipulations of Benjamin  
15 Clark. So, in essence, it's not what Mr. Baca did,  
16 it's what other people did. It is really  
17 prejudicial. It will consume some time for us to put  
18 this into proper context for the jury so that they  
19 don't unfairly hold it against Mr. Baca. So whatever  
20 probative value it might have is substantially and  
21 unfairly outweighed by that prejudice.

22 THE COURT: I'm going to overrule the  
23 objection to number 6.

24 MS. DUNCAN: The next objection, Your  
25 Honor, we have is to paragraph 7. It's, again, an

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1       Eric Duran recording. And the allegation is that Mr.  
2       Baca said that SNM member Carlos Herrera and JR, "BB"  
3       had made mistakes and both members would be hit. As  
4       a preliminary matter, it's not Mr. Baca who made the  
5       comments about SNM member, Carlos Herrera. That  
6       would be Eric Duran. It was Eric Duran talking about  
7       Mr. Herrera making mistakes and needing to be  
8       disciplined. So for that reason, I mean, we would  
9       exclude it because it's about Eric Duran and not  
10      Anthony Ray Baca.

11           And with respect to "BB," the recording  
12      isn't that -- it's not -- the recording is not Mr.  
13      Baca saying I'm ordering that these people be hit.  
14      Again, he's talking about something that had  
15      happened, that he had heard was going to happen to  
16      "BB". So it's dragging Mr. Baca into other people's  
17      actions and seeking to hold those actions against him  
18      unfairly. And we'd ask the Court to exclude it.

19           THE COURT: Mr. Castellano.

20           MR. CASTELLANO: Once again, there is a  
21      discussion of SNM, the SNM Gang, the relationship  
22      among its members, and consequences for violation of  
23      any rules. And the fact that it's a discussion  
24      between members, once again, goes to the  
25      association-in-fact enterprise and relationships

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1 among those associated with the enterprise. It's  
2 actually a requirement that we have to prove.

3 And, actually, I know Mr. Herrera wants  
4 that type of testimony to come in, because then it  
5 makes it look like he's not involved in the Molina  
6 murder, because any mistakes he made according to  
7 their defense, that Mr. Herrera was not involved in  
8 the Molina murder.

9 But other than that, this is once again  
10 discussion of SNM Gang rules, and if people make  
11 mistakes, they get hit.

12 MS. DUNCAN: Your Honor, Mr. Castellano  
13 keeps saying this is a conversation between two gang  
14 members. That's just not true. It's a conversation  
15 between Mr. Baca and a government informant who is  
16 soliciting information from Mr. Baca, trying to get  
17 Mr. Baca pumped up, and -- right, so I think there is  
18 that part. This is not two guys just talking. This  
19 is an informant intentionally trying to elicit  
20 incriminating information from Mr. Baca and asking  
21 him questions intended to pump him up to make him  
22 seem more like a leader.

23 And with respect to Carlos Herrera -- and  
24 I'm not going to speak for his team, but I think that  
25 also goes to the severance that we were discussing

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1       this morning.

2                  But, ultimately, this is a really  
3 prejudicial portion of the conversations. It's  
4 relevance is minimal, and we'd ask the Court to  
5 exclude it.

6                  THE COURT: Well, I think it's relevant and  
7 I do think it's probative, and I don't think it's  
8 unfairly prejudicial. So I'll overrule objection to  
9 number 7.

10                 MS. DUNCAN: Our next objection would be to  
11 paragraph 11. It's, again, a conversation between  
12 Mr. Baca and Eric Duran. They're talking about a hit  
13 on an alleged SNM member, RB. This inaccurately  
14 summarizes the conversation between Mr. Duran and Mr.  
15 Baca. In fact, what they discuss is that this hit  
16 was ordered by Angel. So it's not relevant to any --  
17 to Mr. Baca's conduct this case, and for that reason  
18 we'd ask the Court to exclude it. It's just dragging  
19 in a conversation about general -- about other  
20 people's conduct in a way to paint Mr. Baca in a  
21 negative light.

22                 THE COURT: All right. Mr. Castellano.

23                 MR. CASTELLANO: This is the same argument,  
24 Your Honor, regarding violation of SNM rules and  
25 consequences for violations. And we had discussions

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1 of informants being hit. I mean, it's alleged in the  
2 indictment that the SNM engages in violations of 18  
3 USC Section 1512 and 1513, as well as 1503. 1512 and  
4 1513 relate to interfering or influencing witnesses,  
5 or retaliating against witnesses. And 1503 deals  
6 with the obstruction of justice. So any time the  
7 gang is doing anything against an informant, it's  
8 consistent with what we allege in the indictment and  
9 what we have to prove as part of the racketeering  
10 activity. So, once again, it's a violation of gang  
11 rules and consequences.

12 MS. DUNCAN: Your Honor, I would just  
13 respond. If it is a violation of gang rules and  
14 consequences, it's by someone else. I mean, it's  
15 conduct alleged by Angel, Leonard Lujan, and  
16 "Football Fred," not by Mr. Baca.

17 THE COURT: Well, the allegation is that,  
18 Mr. Castellano, is that Mr. Baca ordered this;  
19 correct? That's what you're going to prove is that  
20 he told RB that this was -- that RB was an informant,  
21 and ordered an SNM Gang members to hit him?

22 MR. CASTELLANO: That's the allegation we  
23 have as an overt act in the RICO indictment. It's  
24 Overt Act 226, I believe.

25 THE COURT: I'm inclined to allow that.

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1                   MS. DUNCAN: And, Your Honor, I would just  
2 ask that the Government re-review -- I believe that  
3 this is from the transcript at 0730, or the recording  
4 is 0730.015. The transcript is page -- it's DeLeon  
5 6064. It's clear from this transcript that they're  
6 talking about Angel calling this alleged hit, and  
7 ordering Mr. Lujan and "Football Fred" to do the hit.  
8 So I would ask the Court, I'd ask the Government that  
9 before this be played, that we revisit this issue.  
10 Because I would certainly don't want this to come in  
11 if it's not Mr. Baca, which it's not.

12                  THE COURT: Well, you'll review it before  
13 trial?

14                  MR. CASTELLANO: We'll review it, Your  
15 Honor.

16                  THE COURT: And if it is Mr. Baca, then you  
17 can admit it. But if it's not Mr. Baca, then alert  
18 the Court, and we'll revisit it.

19                  All right. Ms. Duncan.

20                  MS. DUNCAN: Let's see, Your Honor, there  
21 were a couple more that we had objections to, I think  
22 based on the Court's earlier rulings. I'll just  
23 point them out. The first is paragraph 16, which is  
24 an allegation about a conversation between Mr. Baca  
25 and his girlfriend. I think -- well, partly the

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1 summary by the Government is inaccurate between  
2 what's being discussed. But the allegation is he's  
3 discussing a hit on someone, and something about  
4 narcotics. We would argue that -- we'd ask that this  
5 be excluded based on its incredible prejudicial value  
6 and it's low relevance to the allegations in this  
7 case.

8 And the same would be true of paragraph 20,  
9 which is an allegation that Mr. Baca ordered another  
10 SNM Gang member to threaten the family of a  
11 cooperating witness in a murder investigation. It's  
12 an extremely prejudicial evidence, and its probative  
13 value is substantially outweighed by the danger of  
14 that unfair prejudice.

15 THE COURT: Anything you want to say for  
16 the record on those, Mr. Castellano?

17 MR. CASTELLANO: No, I don't think there is  
18 much to say about those, Your Honor. Especially the  
19 one regarding the -- well, basically hitting or  
20 threatening a cooperator in this case, who was Mr.  
21 Armenta, according to the recordings. So I think  
22 that speaks for itself.

23 THE COURT: I'll overrule the objections to  
24 16 and 20. Others, Ms. Duncan?

25 MS. DUNCAN: That's all we have, Your

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1 Honor.

2 THE COURT: All right. Thank you, Ms.

3 Duncan. So I think I granted in part and denied in  
4 part, but largely denied the objections to those.

5 All right. Let's go to the objections to  
6 the Government's proposed voir dire. Let me see if I  
7 can find the Government's voir dire. Let me look at  
8 my notes here. I guess, as to the allegations here,  
9 I'm going to ask you at the beginning about the case.  
10 I think y'all agreed on a statement of the case that  
11 I'm going to read. I'm going to ask them if they  
12 know anything about this case. I guess the  
13 Government is wanting to go a little further on that,  
14 and see if, after they give more information about  
15 the indictment, whether anybody knows anything about  
16 the case. I guess, if the Government wants to use  
17 its time for that purpose, I guess I don't see an  
18 objection to that. It's kind of their business  
19 whether they want to spend it on trying to plumb a  
20 little deeper and see whether anybody knows anything  
21 about the case. I think we're going to probably  
22 spend a good chunk of time here at the bench going  
23 over with some of the jurors that have had some  
24 exposure to this case. So I guess I'm not inclined  
25 to sustain the objections to paragraph 1 through 13.

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1 I know you've got a separate one as to 12, but I'm  
2 inclined to overrule the objection.

3 MR. VILLA: Your Honor, I think if the  
4 Government wants to recite the charges to some  
5 degree, we might be able to live with that. But the  
6 way that it's drafted is, you know, reading the --  
7 each count, the co-defendants charged in each count,  
8 the monikers of each defendant and co-defendant. I  
9 mean, it's almost essentially a complete recital of  
10 the second superseding indictment.

11 And I don't think it's proposed, but I  
12 certainly would suggest that the Government not be  
13 permitted to dive into some of the things that were  
14 the subject of a motion to strike surplusage.  
15 They're not proposing to do that in their voir dire.

16 But, for instance, if you look at paragraph  
17 7, it essentially reads the entire Count 6 as it  
18 would read in the indictment. And I suppose the  
19 Government is entitled to read the nature of the  
20 charge, or reiterate the nature of the charge. But  
21 including all the defendants and the co-defendants  
22 and their monikers, I think the Government should be  
23 limited to just the defendants. If it wants to ask  
24 about co-defendants who might testify, I think they  
25 can do that, when it comes to naming witnesses. But

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1 I think just rereading each count in the indictment  
2 is unnecessary to get to where the Government wants  
3 to go.

4 THE COURT: All right. Who is handling for  
5 the Government? Mr. Beck.

6 MR. BECK: That's me, Your Honor.

7 THE COURT: Mr. Beck.

8 MR. BECK: I think that's fine. We don't  
9 intend to get into any of the surplusage in the  
10 indictment. We might read some of the charges and  
11 some of the defendants' monikers. There are only  
12 four defendants. We'll read some of the other  
13 defendants just to make sure that -- I mean,  
14 depending on what Your Honor does, just to make sure  
15 that no one knows any of the other co-defendants.

16 THE COURT: Here's what I'll do, is I'll  
17 let you introduce your clients at the beginning of  
18 the voir dire. And then, at some point, we're --  
19 pretty shortly thereafter, each side should be  
20 prepared to mention any witnesses that they're going  
21 to be calling or may be calling, so we can find out  
22 if any of the jurors know any of the potential  
23 witnesses. So that's what I'll do I guess on that  
24 score. Doing that, then, what do you need out of  
25 these 12 paragraphs?

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1                   MR. BECK: As I said, I think really what  
2 we need is to talk about, you know, the other  
3 defendants, make sure they don't know, and just  
4 orient the jury to the charges.

5                   THE COURT: When you say "the other  
6 defendants," who are you talking about?

7                   MR. BECK: The defendants in the Trial 2.  
8 I expect we will have weeded out anyone who knows the  
9 SNM by this point. But, if not, I think we may want  
10 to do that, just to make sure that at some point one  
11 of the jurors doesn't stand up and say, Oh, I know  
12 that person. I think that's a good thing to do. And  
13 I can tell you that a lot of these defendants don't  
14 even know -- a lot of defendants and SNM members  
15 don't even know the other defendants and SNM members'  
16 names, as opposed to just their monikers.

17                  So I know the defense takes the position  
18 that those may be inflammatory, or what have you, but  
19 that's just how those folks are known in the  
20 communities in which they run. So --

21                  THE COURT: Well, I guess I'm still not  
22 seeing how to really keep it out. It may be that, if  
23 they want to use their time to explore: Does anybody  
24 know anything about this case, that's helpful to us  
25 all.

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1                   MR. VILLA: I think it is to a degree. I  
2 mean, with respect to the defendants who are on  
3 trial, I don't think their monikers need to be read.  
4 If the Government is concerned that someone in the  
5 venire knows them, they're going to be able to see  
6 them, and so I think they can ask does anybody know  
7 any of these four defendants?

8                   With the people who aren't in the room,  
9 Trial 2 folks, or cooperating witnesses, that sort of  
10 thing, if the Government wants to use monikers, I  
11 mean I guess to some extent it's okay. But the  
12 concern that I think we have is the way it's  
13 presented. So in Counts 6 and 7, these nine  
14 defendants are charged. Well, all but one is not on  
15 trial is a cooperator. And so I don't know if it  
16 needs to be presented in the way the Government wants  
17 to, rather than when they list their witnesses,  
18 asking the venire if they know any of these  
19 witnesses.

20                  Now, the one defendant who was charged in 6  
21 and 7, who isn't cooperating, is not on trial,  
22 Mauricio Varela, if the Government wants to ask if  
23 anybody on the venire knows him, I think that's okay.

24                  But the general idea of basically telling  
25 the jury all the counts, all the co-defendants, and

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1       the monikers and the defendants and their monikers  
2       twice is a little bit over the top.

3                   THE COURT: Well, I guess what you're  
4       saying is at least when they're listing out their  
5       witnesses at trial, you don't have any problem with  
6       them identifying -- well, you're saying it's okay for  
7       them to mention monikers for everybody but the four  
8       defendants.

9                   MR. VILLA: I think, yes, if the concern is  
10      do they know the person. Because the defendants are  
11      in the room that solves the defendants' problems. If  
12      it's those not in the room, and they think maybe  
13      somebody knows them by a moniker, unless somebody  
14      else has a different idea, I guess the Government can  
15      ask that question, in the context of this witness or  
16      this person that may be involved in the case.

17                  THE COURT: Could you live with not  
18      mentioning the monikers of the four defendants?

19                  MR. BECK: Honestly, I think that's a bad  
20      way to go. If they're going to have problems with  
21      these defendants having monikers, we don't want them  
22      on the jury. I mean, everyone who takes the stand as  
23      a cooperator is going to call these defendants by  
24      their monikers. That's going to be evidence that's  
25      going to come out in trial. If that creates a

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1 problem for anyone or someone at some point says, Oh,  
2 my gosh "Lazy," I know "Lazy." I didn't know him as  
3 Carlos Herrera, I didn't notice him there. But I've  
4 heard my friends talk about him. That causes  
5 problems for everyone. I think it's a good idea to  
6 mention them by their monikers, and that one way we  
7 know who may have a problem with people having  
8 monikers or who might not.

9 THE COURT: Well, I tend to agree. If they  
10 want to spend their time trying to make sure nobody  
11 knows the people involved in this case, I think  
12 that's going to be to the benefit to all of us to  
13 explore that.

14 MR. VILLA: I understand the Court's  
15 ruling. Perhaps with --

16 THE COURT: Why don't we do this: I think  
17 it's time for our afternoon break. So we'll be in  
18 recess for about 15 minutes. Then we'll come back  
19 and pick up your specific objection to number 12.

20 MR. VILLA: Yes, Your Honor.

21 (The Court stood in recess.)

22 THE COURT: All right. Do we have  
23 everybody? Every defendant has a counsel?

24 MR. COOPER: Now we do.

25 THE COURT: Anybody else missing a counsel?

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1           All right. Mr. Villa, if you wish to --

2           MR. COOPER: We're missing Brock.

3           THE COURT: All right. We'll go back on  
4 the record. It looks like every defendant has an  
5 attorney. I'm going to mark the chart so the record  
6 is clear. The partial table of statements that I  
7 passed out this morning will be marked as Exhibit A  
8 to the clerk's minutes for today. And then I'm going  
9 to have Ms. Standridge pass out to all of you the  
10 more expanded one that we've been working on during  
11 the day, so you'll have it. We'll mark that as  
12 Exhibit B.

13           Now, objection to paragraph 12 is relating  
14 to Mr. Garcia. Do you still want to do anything with  
15 12? Is that one you want to use, Mr. Beck?

16           MR. BECK: No.

17           THE COURT: So we'll sustain that objection  
18 and not hear it.

19           Objection to number 15. These sort of  
20 objections -- here's my proposed solution to them, is  
21 if the Government could just simply say: During the  
22 trial, you will hear evidence concerning alleged  
23 conspiracies to murder Javier Molina and to assault  
24 Julian Romero, the Government -- both members whom  
25 Government believes were part of the SNM prison gang.

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1 So you just add that "the United States contends or  
2 believes to be part of SNM prison gang." Could you  
3 live with that, Mr. Beck?

4 MR. BECK: Yes, Your Honor.

5 THE COURT: And I think that would maybe --  
6 instead of saying "alleged," it gives them a little  
7 bit to say that's what they believe. But it also  
8 takes care of them just making flat statements to the  
9 jury.

10 Is that all right with you, Mr. Villa?

11 MR. VILLA: I think that's fine, Your  
12 Honor.

13 THE COURT: All right. Is number 16 the  
14 same way?

15 MR. VILLA: I believe it is.

16 THE COURT: Same thing, Mr. Beck?

17 MR. BECK: Yes, Your Honor.

18 THE COURT: 17 the same way?

19 MR. VILLA: No, 17 is a little different.  
20 I think the first sentence of 17 should be stricken.  
21 And the Government is certainly free to ask: Do any  
22 of you belong to an organization that seeks to  
23 promote the rights of prisoners? But the first  
24 sentence --

25 THE COURT: If they added in front of it

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1       that it's their belief, they're going to have  
2       evidence of it, and they made that, and then ask  
3       about it, would that be all right with you?

4                    MR. VILLA: Well, I still think the terms  
5       "powerful and violent prison gang operating in  
6       federal prisons throughout United States," I'm not  
7       sure that's even relevant to our case. If they have  
8       to say that at any point that the Syndicato de Nuevo  
9       Mexico is a prison gang, we certainly think it should  
10      be couched in the terms that the Court has just  
11      stated. But the terms "powerful and violent" and  
12      operating inside and outside the prisons throughout  
13      the United States, I'm not sure that's necessary  
14      during voir dire.

15                  THE COURT: Your thoughts, Mr. Beck?

16                  MR. BECK: Your Honor, I mean, I think  
17      there will be proof to that effect in the case. I  
18      anticipate there will be. And I anticipate a number  
19      will say that Syndicato operates in federal prisons  
20      throughout the United States. So I think Your  
21      Honor's proposal is right, if we're going to say that  
22      we say the Government believes that.

23                  THE COURT: Well, I think that will be my  
24      solution. They need to qualify it that it's their  
25      position. They need to own it, rather than stating

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1 it as a fact. But if they do, I think it's fine.

2 All right. Let's go to 28. Let me get 28  
3 in front of me. You're planning to go through the  
4 38, correct, that's your witness list for trial?

5 MR. BECK: I think -- it's not --

6 THE COURT: I'm sorry. It was more than  
7 that, wasn't it?

8 MR. BECK: I think it's around 40. I mean,  
9 I think we've got 38, and then maybe a couple that  
10 are like in between will call and may call, probably  
11 call. So I think we intend to go through at least  
12 that list of about 40 people that we will --

13 THE COURT: It's the second list, not the  
14 first list.

15 MR. BECK: That's right, Your Honor.

16 THE COURT: Anything else on that?

17 MR. VILLA: No, Your Honor.

18 THE COURT: I guess on 29, what if we  
19 rewrote it a little bit? You may hear testimony in  
20 this case by expert witnesses. I think that's fine.

21 Let's take out the "let me advise you,"  
22 because it makes it sound like you're kind of  
23 instructing the jury. Let's just say, "The use of  
24 expert testimony" --

25 MR. BECK: That's fine. I wouldn't say it

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1 like that anyway, the United States wouldn't say it  
2 like that anyway. So that's fine, Your Honor.

3 THE COURT: How about the next sentence be  
4 "the use of expert testimony may be proper in the  
5 context of this case," and then I think the rest of  
6 that was unobjectionable. Could you live with that,  
7 Mr. Beck?

8 MR. BECK: Yes, Your Honor.

9 THE COURT: Does that work for you, Mr.  
10 Villa?

11 MR. VILLA: Yes, Your Honor.

12 THE COURT: And 32, I guess what the  
13 defendant's main objection is they want you to add a  
14 little bit more to it. Would you have any problem  
15 with it, because it --

16 MR. BECK: Well, I think we'll probably  
17 talk about this in connection with the jury  
18 instructions. I'm not sure that the cooperators'  
19 agreement provides a benefit from the Government's  
20 witness. I think in many cases it may.

21 THE COURT: Well, could we do that, that we  
22 say "may" there? So the last part would read  
23 "because he's testifying pursuant to a Government  
24 cooperator's agreement, that may provide a benefit  
25 from the Government to the witness"?

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1                   MR. BECK: I mean, I think that's fine.  
2 There is some folks who are testifying without an  
3 agreement, and that wouldn't -- so I may say  
4 someone -- you know, I mean I don't anticipate  
5 reading this sentence. So I'm not sure that it will  
6 come out exactly the way they want it.

7                   THE COURT: I think it's okay for you to  
8 say "he has pled guilty to an offense, or because he  
9 is testifying pursuant to an agreement that" -- how  
10 about just "that may provide a benefit from the  
11 Government to the witness"?

12                  MR. BECK: Well, I'm worried that -- I'm  
13 worried about agreeing to that, because I'm not sure  
14 it adds anything. And I don't want to run afoul of  
15 the Court's order. So what I'm saying is I don't  
16 think it will be lost on the jury if someone is  
17 testifying pursuant to an agreement, what that means.  
18 I think they have all the right in the world, and I  
19 anticipate they will clarify for the jury what they  
20 believe an agreement does. So I think it's proper  
21 for them to do that in their voir dire, and for them  
22 to do that in their arguments.

23                  But I anticipate that the United States  
24 would say, "You may hear from witnesses who are  
25 testifying pursuant to a plea agreement, or you know,

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1 testifying under an agreement with the Government.  
2 Will that affect your" -- and so my concern is that  
3 in the course of voir dire, where whomever is doing  
4 it doesn't read from a script, that I would run afoul  
5 of the Court's order on that.

6 THE COURT: Well, I think you're not going  
7 to run afoul of the Court's order. To me, I'll just  
8 give you my opinion. I'm not telling you I'm going  
9 to keep it. When you say "agreement," that may work  
10 for us, but for jurors who don't have the lingo down,  
11 I would think you'd get more of a response if you  
12 added what it is. But I'm not going to tell you to  
13 do it.

14 MR. BECK: Okay.

15 THE COURT: And I'm not going to script out  
16 exactly what you say, because I don't want you to  
17 feel like you've got to read it. Because that's not  
18 effective voir dire. And I don't want you to think  
19 you're going to get in trouble, because you're not.  
20 But I will say that I think adding "agreement that  
21 may provide a benefit from the Government to the  
22 witness" may get you a little bit more specificity,  
23 and a little better.

24 MR. BECK: I will heed that advice and  
25 commit it to memory, but if it doesn't come out --

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1                   THE COURT: That's fine.

2                   I guess on number 42, I didn't have a  
3 problem with it. This is something the Government --  
4 if I read their jury instructions, certainly assumes  
5 the burden of beyond a reasonable doubt. But they  
6 talk to them a little bit about other things they may  
7 say. So I didn't have a big problem with it. Did  
8 you like the formulation, Mr. Beck, that the  
9 plaintiffs -- the defendants proposed, beyond all  
10 possible doubt, or do you still like your beyond a  
11 shadow of a doubt?

12                  MR. BECK: I don't have a problem -- that's  
13 not the jury instruction as I understand it. So I  
14 don't anticipate that I will give them a definition  
15 other than what they will be hearing from the Court.  
16 So I think what Mr. Villa proposes there is closest  
17 to what the jury instruction language will be. That  
18 is an area where I will be a little bit more delicate  
19 what I'm saying to the jury.

20                  THE COURT: Okay. So you're not planning  
21 to use a "shadow of a doubt"?

22                  MR. BECK: No, Your Honor.

23                  THE COURT: That was your objection.

24                  MR. VILLA: Yes, Your Honor.

25                  THE COURT: Let's look then, you've got a

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1       cluster here 46, 47, 48, 49, 50, and 51. These are  
2       all the CSI ones, aren't they?

3                    MR. VILLA: For the most part.

4                    THE COURT: "Notwithstanding what you see  
5       on" -- do you agree that -- I never heard "beyond a  
6       CSI doubt," but that's interesting.

7                    The only one that sort of troubles me, Mr.  
8       Beck, is 51. "If traditional evidence of guilt in  
9       this case is strong enough," I guess I don't think  
10      that's the standard, "strong enough." "Be strong  
11      enough to prove the defendant guilty beyond a  
12      reasonable doubt," I think if you added that, that  
13      would be all right with me. The rest of them, I  
14      think are pretty typical in modern cases that they  
15      explore this CSI effect with juries.

16                  So I guess I'm not inclined to sustain any  
17      other objection.

18                  What do you think, Mr. Villa?

19                  MR. VILLA: Well, Your Honor -- and I  
20      certainly think they can explore the jury's views on  
21      the "CSI effect," as we call it. I think some  
22      questions I did have a problem with, "Do you agree  
23      that the Government can prove its case without  
24      presenting any physical evidence?" I'm not sure  
25      that's an accurate statement. It depends on the type

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1 of crime and the evidence. For instance, if all you  
2 have is uncorroborated confession, you don't have any  
3 other evidence, you know, that sort of covers that  
4 area. And I think it's primarily the language and  
5 not the subject matter that the Government uses that  
6 I think is objectionable.

7 Let's see. You know, I agree with the  
8 Court on, I think it was 51, stick to the language of  
9 the Government's burden. But, you know, for  
10 instance -- let's see.

11 THE COURT: I guess I'm a little troubled  
12 by the word "traditional" in that sentence. I don't  
13 know what really traditional evidence is. I think  
14 I'd knock that out, too.

15 MR. BECK: Your Honor, this stuff is all  
16 getting into the weeds and a bit more semantic than I  
17 think is necessary. I understand -- I mean, I'm not  
18 going to give the Court -- I'm not going to give the  
19 venire jury instructions that are inconsistent with  
20 the Court's jury instructions. So I don't have a  
21 problem taking out "traditional," and I don't have a  
22 problem saying our burden is beyond a reasonable  
23 doubt.

24 THE COURT: I think the rest of those are  
25 probably okay. I think they get to explore this CSI

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1 effect. It's a pretty important issue. I think in  
2 Albuquerque they show CSI 119 times a week now.

3 MR. VILLA: It's one of my wife's favorite  
4 shows.

5 THE COURT: Okay. I wasn't going to say  
6 anything.

7 MR. VILLA: I can't watch it with her.

8 THE COURT: That's if you're on cable.

9 You've got be on cable. But isn't that remarkable?

10 All right. Let's go to 52 and 53. You did  
11 just put there, Mr. Beck, discussion of aiding and  
12 abetting, and then I think you may have done the same  
13 with conspiracy. Yeah. What do you want to do  
14 there?

15 MR. BECK: I anticipate a hypothetical with  
16 the jury, walking them through a hypothetical  
17 conspiracy. They commit a crime, and asking them if  
18 they understand that those folks who maybe weren't at  
19 the crime scene would be implicated in the  
20 conspiracy, or aid and abet the person who robbed the  
21 bank.

22 THE COURT: Well, as long as he uses the  
23 language of the Tenth Circuit's pattern instructions  
24 on aiding and abetting and conspiracy, do you see any  
25 problem with that, Mr. Villa?

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1                   MR. VILLA: No, Your Honor. If that's the  
2 intention of what was meant in these paragraphs,  
3 that's fine.

4                   THE COURT: Can you kind of track those  
5 when you ask that question --

6                   MR. BECK: Yes.

7                   THE COURT: -- use the Tenth Circuit  
8 language?

9                   MR. BECK: I think I've said I'll do that.  
10 Yeah.

11                  THE COURT: Anything else on the  
12 Government's voir dire, Mr. Villa?

13                  MR. VILLA: No, Your Honor.

14                  THE COURT: Go ahead.

15                  MR. VILLA: No, go ahead.

16                  THE COURT: Anybody else have any problems  
17 they want to raise with the Government's voir dire?

18                  And I didn't see any objections to the  
19 defendants' voir dire; is that correct, Mr. Beck?

20                  MR. BECK: That's right, Your Honor.

21                  THE COURT: Anything else, Mr. Villa?

22                  MR. VILLA: I had a couple of matters I  
23 just wanted to either flag for the Court or raise  
24 now. One is the Government filed a supplemental  
25 expert notice, 1656. And the defendants filed a

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1 joint response, 1671. I know it's not noticed up for  
2 today, but it is something that we'd ask the Court to  
3 take a look at, so we can address it before the  
4 Government calls any of its experts.

5 THE COURT: Okay. What we've got left  
6 is -- we could plunge into exhibit lists, we could  
7 plunge into witness lists. We could plunge into jury  
8 instructions. I do want to get any feedback on my  
9 proposed preliminary jury instruction before we  
10 leave. And then we've got the motions that were  
11 filed yesterday, the motion to strike cooperating  
12 witnesses, motion to continue the trial, and then --  
13 I don't know if we've covered Mr. Sanchez'  
14 supplemental memorandum sufficiently.

15 Does anybody have a problem, given what we  
16 have, of going to Mr. Villa's motion, or does  
17 somebody feel like we need to go to what's next, and  
18 that's exhibit list?

19 MR. VILLA: And I didn't necessarily need  
20 to raise it now. I think the Court ought to read it.  
21 It was filed by Mr. Castle. The Trial 1 defendants  
22 are certainly prepared to address it. But I just  
23 wanted to put that on the Court's radar for -- if not  
24 later this afternoon or early next week --

25 THE COURT: What number is your motion?

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1                  MR. VILLA: You're talking about the  
2 response on the expert notice?

3                  THE COURT: Well, the one that you're  
4 talking about Mr. Castle filed.

5                  MR. VILLA: 1671.

6                  THE COURT: Okay. I'm not sure I have that  
7 and am familiar with it. 1671.

8                  MR. VILLA: Yes, Your Honor. It's not on  
9 the agenda. I just wanted it to be on the Court's  
10 radar. I do have a copy if you'd like.

11                THE COURT: Okay. Let's maybe -- let's go  
12 to the Government's objections to the exhibit list  
13 first, and we might take something else up.

14                MR. VILLA: One other issue I wanted to  
15 flag before I surrender the podium, Your Honor, is we  
16 understand another cooperating witness pled guilty,  
17 Lupe Urquiza, and the Court has previously ordered  
18 that sealed proceedings like that -- we think it may  
19 be sealed, because it just happened, we haven't been  
20 able to see it. Sealed proceedings, such as the plea  
21 hearing, the plea agreement, and those sorts of  
22 things, the Court has already ordered those to be  
23 produced in response to motions that were filed in  
24 the spring. So we're asking that the Court give us  
25 the same order for Mr. Urquiza. He is a will call in

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1 this trial.

2 THE COURT: Do you intend to produce those  
3 materials, Ms. Armijo?

4 MS. ARMIJO: I'm sorry, I was listening to  
5 Ms. Duncan.

6 THE COURT: I guess --

7 MR. BECK: We do.

8 THE COURT: Is that good enough?

9 MR. VILLA: That does it. I don't think I  
10 have any exhibit list.

11 THE COURT: All right. Ms. Duncan, if you  
12 want to --

13 MS. DUNCAN: Your Honor, I'm sorry that I  
14 was distracting Ms. Armijo from what was happening in  
15 the Court, but I was hoping to save some time this  
16 afternoon. Your Honor, we filed objections to the  
17 exhibit list, somewhat to identify general categories  
18 of objections that we have. I haven't had a chance  
19 to confer with the Government. I know some of these  
20 exhibits they're not intending to introduce, they're  
21 just going to be with their witnesses. I think if we  
22 can sit down with some of the general categories, for  
23 example, autopsy pictures that we objected to, that  
24 we may be able to eliminate some of those objections  
25 without the Court's -- I don't mean to burden the

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1 Court. So I was discussing with the Government  
2 perhaps over the weekend, we can confer, and then  
3 figure out what we can work out, what we can't. And  
4 then bring up the outstanding issues to the Court as  
5 they arise. That's just -- I think that's a better  
6 use of our time.

7 THE COURT: Okay. Is that agreeable to the  
8 Government?

9 MS. ARMIJO: Yes, Your Honor. I think that  
10 there is a lot of things on there, as she said, we're  
11 not planning on having go back to the jury  
12 necessarily, but that for the record, we would be  
13 referring to, and so we obviously put it on our  
14 exhibit list.

15 THE COURT: Well, you know we're going to  
16 use this JERS system. So if it's admitted, they can  
17 press the button and pull it up.

18 MS. ARMIJO: And we already provided that  
19 disk today.

20 THE COURT: You're thinking about pulling  
21 some of these exhibits out, not introducing them at  
22 all?

23 MS. ARMIJO: Correct. I think there is a  
24 lot there that may not necessarily be admitted. But  
25 that instead of, if a witness is on the stand and it

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1       is used to refresh their recollection, or add it to  
2       the exhibit list, we already have it on there.

3                     THE COURT: Okay. Does anybody have any  
4       problem with letting Ms. Duncan talk to Ms. Armijo  
5       and see if they can work these out? Ms. Jacks?

6                     MS. JACKS: I don't have a problem with it.  
7       I guess I'm just thinking, given the Court's two  
8       juries, and essentially two trials going on at the  
9       same time, are we going to -- I think we have to keep  
10      track of which exhibits go to which jury, so I don't  
11      know how the JERS system works, but do we need to  
12      redo the exhibit list so there is an exhibit list for  
13      the Baca-Sanchez trial and then an exhibit list for  
14      the Herrera-Perez trial?

15                  THE COURT: I would think the answer is  
16      yes.

17                  MS. JACKS: So I guess I would also think  
18      then the Government has to produce two separate  
19      exhibit lists, one for the Baca-Sanchez trial, and  
20      one for the Perez-Herrera trial.

21                  THE COURT: Yeah.

22                  MS. JACKS: So it probably makes sense to  
23      put this off till next week.

24                  THE COURT: All right. Seems like we have  
25      an agreement to put it off, so I'll -- I will do that

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1 then. So we'll put the exhibit issue back in.

2 MS. ARMIJO: Your Honor, I'm not sure that  
3 we have to have two lists, because the juries are  
4 going to be very limited on what one jury will hear  
5 and what one jury won't. So I think that it would  
6 be -- and I don't know, maybe that is one thing for  
7 Ms. Wild to consider, if it's more confusing to have  
8 two different -- an exhibit with two different  
9 exhibit numbers, or just as to the items that apply  
10 to one jury, we can specially mark those or note  
11 those other. But I think two exhibit lists may be  
12 more cumbersome, given the limited amount of evidence  
13 that's going to be separated between the juries. So  
14 I think that may be something Ms. Wild wants to weigh  
15 in. But I'm not sure. I'll leave it to the Court.

16 THE COURT: Well, we can talk to her about  
17 it. The thing, I guess, I would ask is the  
18 defendants may have a preference on this, as to how  
19 we designate that. I mean, do you care, Ms. Jacks?  
20 I mean, if we were to have -- I think what Ms. Armijo  
21 is saying is we have a common witness list, and then  
22 for those exhibits that are exclusive for one jury,  
23 we designate those a different way. Do you have a  
24 preference?

25 MS. JACKS: I just think at that point then

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1 what we're going to end up is having three witness  
2 lists. We're going to have the witness list, the  
3 overall witness list, and then we're going to have  
4 the special Sanchez-Baca exhibits and the special  
5 Herrera-Perez exhibits. I'm just thinking this  
6 through. It just seems --

7 THE COURT: Do you have a problem with that  
8 or --

9 MS. JACKS: I just think that's sort of  
10 more confusing than just having an exhibit list for  
11 the Sanchez-Baca trial and an exhibit list for the  
12 Perez-Herrera trial. Then there is only two.

13 THE COURT: Well, let me think about it.

14 MS. JACKS: I don't know how the JERS  
15 system operates, so I don't know --

16 THE COURT: Well, there will be in  
17 different jury rooms, so they will be on different  
18 systems. So I don't think we'll have a problem with  
19 the JERS. Let me give it some thought, and I'll come  
20 back to you with a proposal on that.

21 All right. Mr. Villa, I think you're  
22 taking the lead on the objections to the witness  
23 list.

24 MR. VILLA: Your Honor, I think this would  
25 be quick. The objection was primarily to preserve

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1       the issue that we were just discussing with exhibits,  
2       that some of these witnesses are only admissible to  
3       Counts 8 through 12, and some of them are only 6 and  
4       7, so we were essentially just objecting to the  
5       witnesses that were providing testimony in 8 through  
6       12, that isn't admissible to us. The Court has ruled  
7       on the severance issue, and we'll have to probably  
8       deal with the witness issue the same way we deal with  
9       the exhibit issue, if we get two juries. So it's  
10      sort of a preservation placeholder.

11                  THE COURT: All right. Do you need  
12       anything from me this afternoon on that?

13                  MR. VILLA: I don't think so, Your Honor.

14                  THE COURT: Anybody else need anything?

15       How about --

16                  MS. JACKS: I think we need some guidance  
17       from the Court as to whether it's going to allow the  
18       testimony regarding Counts 8 through 12, which is  
19       inadmissible against the Counts 6 and 7 defendants.

20                  THE COURT: Here's what I'm thinking are  
21       the big categories: The Marcantel will come in.  
22       I'll give limiting instructions on that. So I'll not  
23       exclude either jury from that. The categories that  
24       Baca and Sanchez will not -- your jury will not be  
25       sitting through will be the Herrera, Duncan (sic),

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1 and Perez, Cordova. Those are the big categories.

2 MS. JACKS: Right. I just end up saying  
3 the same thing over and over.

4 THE COURT: I know.

5 MS. JACKS: But my only observation about  
6 that is least for the trial of Herrera and Perez, if  
7 they have a separate jury, there is no reason for  
8 that jury to be present when the Marcantel-  
9 Santistevan testimony is presented, you know what I  
10 mean? There is no reason for them to be hearing it,  
11 and then be told to disregard it.

12 THE COURT: Well, I think the Government  
13 does have problem with that.

14 MR. BECK: Yeah, I think those are all  
15 racketeering activities, and so they're all relevant  
16 and admissible in the trial. What's not admissible  
17 against some defendants is hearsay. So that's  
18 inadmissible evidence.

19 MS. JACKS: Right.

20 MR. BECK: The counts are admissible. What  
21 I understand the Court's ruling to be is that, when  
22 we play -- at least right now -- when we play the  
23 recordings with the transcripts of certain statements  
24 that will come in only against one or the other,  
25 that's when we'll exclude the juries. They will hear

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1 the admissible testimony of that evidence. So I  
2 think that's what Ms. Armijo was referring to  
3 earlier, that there would be a limited portion of the  
4 trials, when we will have only one jury or the other.

5 MS. JACKS: I guess what I was referring to  
6 was co-conspirator statements, because it seems like  
7 the primary evidence of the Marcantel-Santistevan  
8 conspiracy is co-conspirator statements that would be  
9 inadmissible hearsay as to --

10 THE COURT: If I can limit it that  
11 precisely, I would be inclined to do that. If I can  
12 get away with a limiting instruction, I will. Is  
13 that -- are we saying the same thing, Mr. Beck?

14 MR. BECK: I think so. I mean, I think  
15 that will be --

16 THE COURT: There will be times in your  
17 presentation of the Marcantel case where the evidence  
18 is not -- I mean, let me see if I can put it in my  
19 words, and then we'll see if everybody is agreeing.  
20 You are allowed, the Government is allowed to prove  
21 the Marcantel conspiracy, and use that as evidence of  
22 enterprise and racketeering activity. But there may  
23 be portions of that proof that we would be saying, if  
24 we were having the trial all together, that this  
25 could not be considered, and that particular evidence

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1       we may excuse the jury so I don't have to give a  
2       limiting instruction.

3                    MR. BECK: Yes.

4                    THE COURT: That's your understanding?

5                    MR. BECK: Yes.

6                    MS. JACKS: I think we're on the same page.

7                    And I guess the other thing I would like  
8       some ruling on is, I would argue that the opening  
9       statements should be presented to the jury -- I guess  
10      I think they should be separate. So, in other words,  
11      I don't think the Sanchez-Baca jury should be hearing  
12      the Perez-Herrera opening statements. And I think  
13      there is potentially some tension, particularly as to  
14      whether either Mr. Perez or Mr. Herrera are going to  
15      pursue some idea of duress caused by Mr. Sanchez.  
16      And so I think, if we're going to go forward with  
17      this on Monday or Tuesday, it would be nice to know  
18      that now.

19                   THE COURT: Your thoughts?

20                   MS. ARMIJO: Your Honor, I'm doing opening,  
21      and I have already tailored my opening to not deal  
22      with the evidence that's excluded from the one jury.  
23      So our preference is that we do one -- at least the  
24      United States will do one opening statement.

25                   If the defense wants to do different

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1       openings, then that's their -- I guess they could do  
2       it. But the United States is presenting one opening  
3       statement that will not include testimony that the  
4       one jury cannot hear.

5                  THE COURT: Do you see any problem with  
6       that, Ms. Jacks? If the Government wants to tailor  
7       theirs to make it more general and not get into the  
8       evidence that they make theirs --

9                  MS. JACKS: It's hard to just rule -- I  
10       mean to give an opinion just based on that  
11       representation. But I think the concern is -- I  
12       mean, what Ms. Armijo is saying is that there is  
13       evidence one jury is not going to hear. But really  
14       there is evidence that -- the Baca-Sanchez jury is  
15       not going to hear certain stuff, and the  
16       Herrera-Perez jury is not going to hear different  
17       things, right? So I don't know that it's just one  
18       jury that's only going to hear certain evidence the  
19       other is not.

20                 MR. BECK: I think I can interpret that and  
21       clear it up. Sorry, I don't mean to step on your  
22       toes.

23                 MS. JACKS: That's all right.

24                 MR. BECK: I think Ms. Armijo was  
25       misspeaking a little bit. My understanding of the

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1 Court's ruling is that there may be statements also  
2 in Mr. Herrera's recordings and Mr. Perez' recordings  
3 during which the Baca and Sanchez jury will be  
4 excused. Just like there may be portions of Eric  
5 Duran's recordings and Mr. Baca's recordings --  
6 Mr. Duran recording Mr. Baca, during which Mr.  
7 Herrera and Mr. Perez' jury would be excluded. So I  
8 think there may be -- based on this, and obviously,  
9 we'll take -- this being the Court's chart, Exhibit B  
10 to the clerk's minutes -- once we take a closer look  
11 at that, I think we'll have more guidance of when one  
12 jury or the other may be excluded. But I think there  
13 may be times --

14 THE COURT: Let's assume that will be the  
15 case. I haven't quite thought it out. But it sounds  
16 like everybody is in agreement that is the case.  
17 Y'all are more familiar with the evidence. I took a  
18 shot at it from what I heard in the James hearings  
19 and co-conspirators, and again played with the  
20 evidence.

21 So assuming that's the case, do you have  
22 any problem with letting Ms. Armijo do her opening,  
23 and then if y'all want to have tailored ones, and  
24 only have it to your specific juries, do that?

25 MS. JACKS: I mean, it would depend upon

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1 what's in her opening. So I mean, I don't know --

2 THE COURT: I don't need to know today.

3 You can decide that at the time.

4 MS. JACKS: Okay.

5 THE COURT: But we'll let the Government do  
6 theirs, and we'll take their representations that  
7 they're going to keep it general, and not get into  
8 specific as to evidence that's going to be excluded,  
9 or might be excluded from the other jurors. And then  
10 y'all can decide how y'all want to do your opening.

11 MS. JACKS: Okay, great.

12 THE COURT: Mr. Villa?

13 MR. VILLA: I just want to say I agree with  
14 Ms. Jacks. I think the defense openings, at least  
15 have to be separate, and if we want to get into  
16 specific detail, I mean, that's my preference. We  
17 sort of talked about it this morning, and I thought  
18 about it more.

19 THE COURT: Well, you know more what you're  
20 going to be arguing. To some degree, I don't know  
21 what you're going to be arguing.

22 MR. VILLA: Yes. We don't argue in  
23 opening, Judge.

24 THE COURT: That's right.

25 MR. VILLA: But, yes, I think we would ask

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1 for separate.

2 THE COURT: That's fine. It doesn't seem  
3 Ms. Armijo cares what y'all do on that.

4 Let me see what Ms. Bhalla -- and then I'll  
5 come back to Mr. Castellano.

6 MS. BHALLA: Your Honor, it was just about  
7 the witness lists. I can -- if we want to keep  
8 talking about opening statements, I can wait. I just  
9 didn't want to climb in and out.

10 THE COURT: Hold on. Let me finish up on  
11 the openings, since Mr. Villa who filed this  
12 primarily is using it to preserve his position. Let  
13 me get Mr. Lowry. Are you on openings, Mr. Lowry?

14 MR. LOWRY: No, Your Honor. I wanted to  
15 talk about the motion to strike.

16 THE COURT: Mr. Castellano, did you have  
17 anything else on the openings?

18 MR. CASTELLANO: Kind of, Your Honor. And  
19 this is -- it kind of overlaps with the two juries.  
20 Is the Court going to instruct the juries that we  
21 have two of them, because there are certain things  
22 that one jury can hear that the other can't, based on  
23 the Court's pretrial rulings, and that there are  
24 things they can hear together? Is that the idea?

25 THE COURT: I haven't -- let me ask you

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1       this: I may have to go back. I got Mr. Garcia out  
2 yesterday afternoon. Is the preliminary instruction  
3 that I have, is that sufficient to begin the case?  
4 And then I'll start looking at the final  
5 instructions.

6                   MR. BECK: Do you want to hear from the  
7 United States on that, Your Honor?

8                   THE COURT: Yes.

9                   MR. BECK: It is.

10                  THE COURT: Okay. Did the defendants have  
11 any problem with the preliminary? Okay.

12                  MR. LOWRY: No, Your Honor.

13                  THE COURT: Let's plan, then -- on that  
14 instruction, let me do that together. Okay?

15                  Mr. Maynard.

16                  MR. MAYNARD: Your Honor, on the  
17 preliminary instructions, in general, I have no issue  
18 with them. But at a juncture just before the Court  
19 starts talking about the elements, I really think it  
20 would be appropriate, in fact I think it's necessary,  
21 to explain to the juries that there is going to be,  
22 in a way one trial, two juries, but four individuals  
23 are independently on trial. And that the Court is  
24 going to -- the jury is going to be instructed to  
25 assess the evidence independently as to each

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1 defendant in each count, just a couple of sentences,  
2 before the Court transitions into the elements.

3 THE COURT: Does the Government have any  
4 problem with that?

5 MR. BECK: No, Your Honor.

6 THE COURT: All right. Anybody else?

7 Mr. Maynard, why don't you draft it up and  
8 send it around, and then tell me where you wanted to  
9 insert it. If there is an agreement on that, get an  
10 agreement, and we'll stick it in there.

11 All right. So other than what Mr. Maynard  
12 is going to draft up, I'll use the preliminary  
13 instruction, and I will instruct the jury all at the  
14 same time, swear them in at the same time, and then  
15 we'll go to Ms. Armijo, who will argue -- or who will  
16 make her opening statement, and then we'll see where  
17 we are with the defendants at that point.

18 MS. JACKS: I think the other instruction  
19 that probably should be given is for the juries not  
20 to interact with each other. Because at least, in my  
21 experience, that's the biggest problem with multiple  
22 juries.

23 THE COURT: Do you want to put that in  
24 there, Mr. Maynard? Do you want to draft out  
25 something and put it in your paragraph?

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1                  MR. MAYNARD:  They're not to talk to each  
2                  other.

3                  MS. JACKS:  Or interact, or discuss the  
4                  case.

5                  THE COURT:  Well, y'all haven't had --  
6                  well, some of you have had trials with me.  But I  
7                  talk to the jury till all of you are sick --  
8                  everybody about not talking to each other.  And I'll  
9                  start during voir dire.  So I don't mind them putting  
10                it in there.  And if fact, if you look at my jury  
11                instruction, that last paragraph, I do say that.  I  
12                don't say it as to two juries.  But you can put that  
13                in, Mr. Maynard, and if everybody agrees, we'll put  
14                it in there.  But we'll all get sick of it.  I'll get  
15                sick of saying it, and they'll get tired of hearing  
16                it, and y'all will be bored as well.  So we'll work  
17                hard to make sure they don't do that.  Maybe won't  
18                have the problem, since it's a statewide venire, of  
19                what Ms. Jacks had, of people knowing each other on  
20                the jury.  And I'll try to ask that.  I will try to  
21                ask that in my voir dire.  I'll try to ask if anybody  
22                in the jury knows each other.  If we end up bringing  
23                in multiple groups, then obviously, I'll need to do  
24                that multiple times.  But we'll do that.

25                All right.  Anything else on sort of the

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1 mechanics of the opening preliminary instruction? If  
2 not I'm going to go to --

3 MS. ARMIJO: I just wondered, are they all  
4 going to be in the same room? Is there enough room  
5 in the jury room?

6 THE COURT: We'll get two jury rooms.

7 MS. ARMIJO: Okay. If they're in the same  
8 room, that's awfully hard not to.

9 THE COURT: When they go to one jury room,  
10 they'll go to one, and another one to another. Isn't  
11 that right, Ms. Wild?

12 THE CLERK: Correct.

13 MS. JACKS: Your Honor, when I've done two  
14 jury trials, two trials with two juries, what I've  
15 seen is generally the juries are like designated like  
16 with a color or some easily identifiable designation  
17 like the red jury and the blue jury, whatever it is.  
18 So that they know that they go to a different place,  
19 and with a different group, and they actually have  
20 different color juror identification badges. So just  
21 a thought.

22 THE COURT: Okay. We typically in New  
23 Mexico don't put badges on our jurors. But we can  
24 certainly think about that.

25 MS. JACKS: I think the issue is so that

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1       they know -- I guess the issue is, not only do we  
2       need to know who the jurors are, but they need to  
3       know who the other jury is, so that they don't  
4       accidentally start engaging with them.

5                  THE COURT: We'll give that some thought  
6       and make sure that they don't.

7                  Do you have something on this issue?

8                  MS. DUNCAN: I do, Your Honor, a related  
9       issue. I know earlier we had talked about the order  
10      in which the defense would go for voir dire and  
11      openings. And you had asked for that information.  
12      We had come up with a preliminary plan, and then with  
13      the plea of Christopher Garcia yesterday and the two  
14      juries, I think it may change. I'd like to confer  
15      with my colleagues about the openings before we give  
16      that order. But I was wondering if the Court would  
17      like to know -- we've come up with an order for voir  
18      dire, if that would be helpful to the Court.

19                  THE COURT: Yeah. You handed this to me.

20      All right. What are you proposing as your order?

21                  MS. DUNCAN: Ms. Jacks is asking are we  
22      doing the voir dire all groups at once? How are you  
23      anticipating.

24                  THE COURT: I think so, don't you?

25                  MS. JACKS: This is just how I was thinking

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1 about it. I would think it would be sequentially,  
2 that Jury A would be selected and voir dire by the  
3 lawyers for that jury. And then Jury B would be  
4 selected after that. Right? Like, why would lawyers  
5 who aren't involved in the Sanchez-Baca trial be voir  
6 diring, or doing anything with the Sanchez-Baca  
7 jurors?

8 THE COURT: Is that all right with  
9 everybody?

10 MS. DUNCAN: Yes.

11 THE COURT: It's not going to affect the  
12 Government at all, but --

13 MS. ARMIJO: Yeah, but I'm wondering with  
14 numbers, because I think our numbers are precious so  
15 to speak. And let's say the first group has -- and  
16 I'm just throwing out number 70, and we all know we  
17 only need 40 after excusals. Then let's say we have  
18 leftover jurors. What's going to happen to the  
19 leftover jurors? Shouldn't those leftover jurors  
20 that we don't use for the first panel go into the  
21 second panel for consideration? So that's where I  
22 think it gets messy. We can't just simply divide the  
23 numbers up. So that's something to consider,  
24 given -- and if we have 400 jurors -- and we don't --  
25 I think we keep getting lower and lower numbers.

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1 That's my concern.

2 THE COURT: We're going to have to conserve  
3 jurors.

4 Let Ms. Wild -- she's thought about this --  
5 let her tell you what we're proposing on the jurors,  
6 how we're going to use them.

7 THE CLERK: So instead of bringing up  
8 groups of 20, necessarily, when we get through the  
9 first 60, we'll have a feel, do we need 20 more?  
10 Maybe we don't need that many. So we'll bring up  
11 incrementally smaller groups to try to preserve our  
12 resources. And I think that that's the way we handle  
13 it in terms of making the best use of folks' time and  
14 seating the jurors.

15 THE COURT: But I guess the question  
16 they're asking is --

17 (A discussion was held off the record.)

18 THE COURT: Is everybody in agreement and  
19 I'll ask you as well. Is everybody in agreement that  
20 we should just pick the first jury, and that would  
21 mean that two of the defense teams don't ask any  
22 questions in that. And like Ms. Wild says, we may  
23 have to be a little bit flexible. When we're picking  
24 that first jury, we may not want to bring 20 in, if  
25 we only need one person. We might just bring five in

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1 so we leave more for that second group. Everybody  
2 live with that?

3 MS. JACKS: I think so.

4 MS. DUNCAN: I think that makes sense.

5 THE COURT: If, in fact, we have some  
6 leftover jurors from the first one, what -- I'm  
7 thinking out loud, so everybody can tell me if this  
8 is a bad idea -- go ahead and send them back to the  
9 jury room, and if we don't need them, we never see  
10 them again, they don't see us, and we pick our new  
11 jury, the second jury out of a fresh batch.

12 MS. JACKS: I think that's right.

13 MS. DUNCAN: I would agree. I think that  
14 makes sense.

15 THE COURT: But we'll leave them down there  
16 in case we need 10, 15 that we didn't use from the  
17 first one. We might bring them back up, and we might  
18 need one or two or something.

19 MS. JACKS: I'm just thinking out loud.  
20 But the one other thing I was thinking is, to the  
21 extent that the Court's voir dire is the same for  
22 Trial A and Trial B, or Jury A and Jury B, maybe  
23 there is some sort of way to -- for the Court to do  
24 its voir dire of the whole panel.

25 THE COURT: I just think it would take us

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1 forever.

2 THE CLERK: There is no room.

3 THE COURT: There is no room. And there is  
4 just no room. We don't even have -- I think we'll  
5 have to just pick two juries. And I'll have to do it  
6 twice. And everybody -- the Government will have to  
7 do it twice, and the new defendants will have to -- I  
8 just don't think we have enough room here.

9 MS. DUNCAN: We're whispering about  
10 figuring out who is going first in terms of planning  
11 for the two.

12 THE COURT: I'll tell you, if I were  
13 defendants -- well, it would apply to the Government,  
14 too -- I think you're going to want to do it all  
15 over, because you're going to want to look over at  
16 this jury box, the 18 that are going to be in the  
17 jury box, because, you know, if nobody strikes down,  
18 they're your jury. I think, visually, if I were a  
19 trial lawyer here, I wouldn't want to be trying to  
20 figure out -- well, you're just saying for the  
21 general stuff, aren't you?

22 MS. DUNCAN: Yes.

23 THE COURT: Well, I probably will let the  
24 Government select who they want the first jury to be.  
25 Because if I don't get two juries on Monday, then I

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1 probably have to go to plan B.

2 So who do you want to be the first jury  
3 selection to be, Mr. Castellano?

4 MR. CASTELLANO: Mr. Baca, Mr. Sanchez,  
5 Your Honor.

6 THE COURT: All right. So Baca-Sanchez  
7 will be Jury A. And then we'll go with Perez-Herrera  
8 will be Jury B.

9 MR. CASTELLANO: Your Honor, maybe we can,  
10 in the meantime, think about what size groups we'd  
11 want to come in. We may actually end up doing voir  
12 dire more than twice. So, for example, as the Court  
13 said, we might need one juror and only call in five.  
14 There is a chance we could extend this into multiple  
15 voir dires.

16 The other kind of strange thing -- maybe  
17 it's not a real issue -- is the group dynamics. If  
18 we pull in a group of 5, there is a weird dynamic as  
19 opposed to a group of 40. I'm just putting it out  
20 there to think about in the meantime. I know we're  
21 not there yet, but it's coming up.

22 THE COURT: I'll work with you. I  
23 understand what you're saying. I'll work with you,  
24 we'll kind of see if we're -- you know, let's see how  
25 many show up. I hope we get a good return rate and

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1 everything.

2 All right. If there is nothing else on  
3 mechanics right at the moment -- I know there will be  
4 more things on mechanics -- but if there is nothing  
5 else, why don't we go to -- I think, Ms. Bhalla, you  
6 wanted to talk about what -- the motion that's up,  
7 the actual exhibit witness list.

8 MS. BHALLA: If that's okay, Your Honor.

9 THE COURT: Certainly.

10 MS. BHALLA: Your Honor, I don't think it's  
11 a major issue. I just -- when I started thinking  
12 about whether or not we separate out the witness  
13 lists, some of the witnesses that the Government may  
14 be calling that provide testimony to Mr. Sanchez and  
15 Mr. Baca, we may want to question in our  
16 case-in-chief. But because of the joint witness  
17 list, we didn't necessarily identify them because the  
18 other parties had identified them. I just ask that  
19 maybe the way we could deal with that is if we decide  
20 at that time that we want to be able to re-call them,  
21 we alert the Court, just depending on what comes up.  
22 And hopefully, that won't be too big of an issue. I  
23 don't think it will happen with that many witnesses.  
24 But I see that happening.

25 And I know that some people sent Agent Acee

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1       a Touhy letter. We didn't necessarily do that,  
2 because we weren't going to have to do that in order  
3 to question about those issues. Do you see what I'm  
4 saying, Your Honor? I want to make sure we can maybe  
5 have a little bit of flexibility in how we handle  
6 that.

7                  THE COURT: Any objection from the  
8 Government on that?

9                  MS. ARMIJO: Depends on who the witness is.  
10                 If it's an FBI agent, or somebody like that that's  
11                 subject to Touhy, they will have to file Touhy  
12                 letters. So we're not going to waive on the Touhy  
13                 letters or the witness' right to Touhy. If it's  
14                 somebody -- and some of these witnesses are close by,  
15                 some of them are in custody. So I think -- I mean,  
16                 we'll try and be as flexible as we can. But we still  
17                 are going to require Touhy letters, if that's an  
18                 issue.

19                  THE COURT: Okay.

20                  MS. BHALLA: And if that's the case, maybe  
21                 to expedite things, would the Government have any  
22                 objection to us sending those to the Government to  
23                 try to speed up the process a little bit?

24                  MS. ARMIJO: We're not accepting service,  
25                 but certainly if it's a Touhy letter, we'll send it

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1 to the appropriate authorities.

2 MS. BHALLA: Okay.

3 THE COURT: Anything else on that, Ms.

4 Bhalla?

5 MS. BHALLA: No. And I just, just that we  
6 have the ability to re-call some of the cooperators  
7 if something comes up in the Baca-Sanchez matter that  
8 would be relevant to the Perez-Herrera matter.

9 THE COURT: Do you have any problem with  
10 that?

11 MS. ARMIJO: It's going to depend on the  
12 issue and why they call them. They can't have -- so  
13 it may, depending on why they're re-calling them and  
14 what the issue is.

15 MS. BHALLA: I mean, I think it would be  
16 directly related to -- some of the witnesses, Your  
17 Honor, have information on all four defendants that  
18 are going to trial. And --

19 THE COURT: Maybe I'm being very simplistic  
20 here, but you're going to know who the witnesses are  
21 in the Baca/Sanchez trial.

22 MS. BHALLA: I hope so.

23 THE COURT: So can't you, at that point,  
24 just say: Can I get some testimony here?

25 MS. BHALLA: That's what I was asking, if

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1 we can handle that it way --

2 THE COURT: Is that a problem if while  
3 they're here they ask, or is there something special  
4 about these witness lists that create some problem  
5 for the Government?

6 MR. BECK: You mean asking them questions  
7 on cross-examination that may be out of the scope of  
8 our direct may be subject to re-call? Is that what  
9 we're asking?

10 THE COURT: No, I think they're asking in  
11 your case-in-chief, right, you want to be able to  
12 re-call people that other defendants have called? Am  
13 I misunderstanding.

14 MS. BHALLA: No. For example, Your Honor,  
15 let's say one of the cooperating witnesses, you  
16 know -- and some of the cooperating witnesses they  
17 may provide statements that are exculpatory for Mr.  
18 Herrera, but the Government doesn't call them in the  
19 Herrera-Perez line of questioning. They call them in  
20 the Sanchez-Baca line of questioning. And we want to  
21 get out that information. Does the Court want us to  
22 re-call them in our case-in-chief.

23 THE COURT: Well, I've got to observe the  
24 American Rule.

25 MS. BHALLA: Right.

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1                   THE COURT: If they're not using anything  
2 against you with that witness --

3                   MS. BHALLA: Then we need to re-call them.

4                   And we didn't have that issue before this morning.

5                   So I'm just trying to figure out the most --

6                   THE COURT: Tell me why not. If they're  
7 not using any of the witnesses against you, you  
8 wouldn't be able to get that information out anyway,  
9 would you?

10                  MS. BHALLA: Well, I think that the way  
11 that we thought our witness list -- all of those  
12 parties are on the witness list. But it was a joint  
13 witness list. So that's my question. Do we need to  
14 delineate out the witness lists now because there are  
15 two juries. Do you see what I'm saying?

16                  THE COURT: Now, you're talking about your  
17 case-in-chief?

18                  MS. BHALLA: Yes, Your Honor.

19                  THE COURT: Okay. Well, do they need to do  
20 that? If they did a joint defense witness list, now  
21 they don't need to break it out, do they?

22                  MS. ARMIJO: Well, I think if they're going  
23 to be putting them separate, and not in front of  
24 another group, we would like to know that.

25                  I mean, I think -- and maybe I'm mistaken,

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1       but I think there is going to be very little evidence  
2       that is not going to both juries as far as witnesses.  
3       It's not going to be, you know, over 10 witnesses. I  
4       think it's going to be -- unless I'm missing  
5       something, it's going to be very limited about what  
6       one jury will hear and what doesn't hear. And the  
7       defense already knows that.

8                  If the defense is going to be putting forth  
9       the same thing, and only wants some witnesses to one  
10      jury or not, I think we have a right to know that.  
11      And I think they do have to file their own witness  
12      list that just pertains to them. I think we would  
13      request that.

14                MR. CASTELLANO: And related to that, I  
15       guess, Your Honor, is -- so the witness is going to  
16       be on the stand --

17                THE COURT: Isn't this easily solved by you  
18       just filing a witness list? I mean, if you want to  
19       list all the witnesses that are on there, if the  
20       Government wants to know what your witness list is  
21       going to be, there is going to be some overlap.

22                MS. BHALLA: I think that's fine, Your  
23       Honor. We can certainly try to do that. I'm just  
24       trying to figure out how we need to handle this the  
25       most efficiently. So I can certainly talk to the

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1       Government about that, Your Honor, and see what we  
2       can do. Get something filed separate.

3                    MR. MAYNARD: Your Honor, if I may, some  
4       of -- we anticipated Mr. Herrera's case was going to  
5       be elicited on cross of the Government's own  
6       witnesses. But now we're not sure which witnesses,  
7       and we're not sure about the scope of direct in our  
8       aspect of the case, as the Government presents that  
9       testimony.

10          MR. CASTELLANO: I think --

11          THE COURT: That problem is always there.  
12       You never know. They may just say I'm going to  
13       ignore Herrera on this witness. And if you do, then  
14       you've got to fight the American Rule to see if you  
15       get to cross-examine to save time. I mean, it's --  
16       you always got that problem, right? Unless we have  
17       an agreement that if somebody is called by the  
18       Government, we're going to get their  
19       cross-examination done. If the Government agrees to  
20       that, then we can move that along.

21          MR. MAYNARD: I'm just wondering if we're  
22       going to have to scramble, and ask for some writs and  
23       some subpoenas in a hurry. It may not be likely, but  
24       it --

25          THE COURT: Well, let me ask the

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1       Government -- I think I know the answer from what you  
2 just said -- but do you want to -- if you have a  
3 witness here, allow the defendant to get their  
4 cross-examination done of that witness, and not stand  
5 on the American Rule, and get witnesses in and out,  
6 so they're not subject to re-call, or do you want to  
7 insist on the American Rule in your case-in-chief?

8                   MR. CASTELLANO: I think it's going to  
9 depend. But I think, for the most part, we're going  
10 to present our case, and so we're going to present  
11 all of our evidence. So our presentation doesn't  
12 change. It's which jury gets to hear which evidence,  
13 which I think is largely evidence which is the  
14 hearsay the Court doesn't want each jury to hear.  
15 But we're going to go through all of our evidence and  
16 put on all our witnesses. So they should have the  
17 opportunity to cross-examine all the witnesses that  
18 they want.

19                  THE COURT: Let's say you put on a witness,  
20 and it doesn't implicate Herrera at all. Are you  
21 going to stand on the American Rule and say, if Ms.  
22 Bhalla wants to cross-examine him about something  
23 that really is not within the scope of your cross,  
24 you want to insist that she call her in her case? Or  
25 do you want to get the witness up and out?

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1                   MR. CASTELLANO: The answer is maybe, it  
2 depends. Because, for example --

3                   MS. BHALLA: This is why I brought it up.

4                   MR. CASTELLANO: Because the objection is  
5 that it's beyond the scope of direct. And so if  
6 somebody is going to go that far afield of our  
7 presentation of our case, and takes us off on a  
8 tangent in front of a jury who needs to hear this  
9 evidence we're presenting, that changes the  
10 complexion of the case and the presentation.

11                  THE COURT: Let's do this: I think we need  
12 to break the witness list out. You send a letter to  
13 the Government saying: Here's my witnesses. And  
14 then, if the Government looks at that and tell them:  
15 You need to subpoena these people or you don't need  
16 to subpoena them. And then tell them that you may  
17 dig in your heels on some and not on others. And  
18 it's your call. I mean, if you want them to -- but I  
19 think they need to know which ones to get subpoenas  
20 out for. Does that make sense?

21                  MR. CASTELLANO: It makes sense, Your  
22 Honor. Then the issue, for purposes of  
23 cross-examination, is what they elicit -- I guess may  
24 not matter if it's going to the right jury. Let's  
25 say we have two juries sitting here, the Court may

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1 have to give a limiting instruction even for  
2 cross-examination to say this information is only  
3 pertinent to this jury, and not for this jury because  
4 you're going to pull out hearsay or some other --

5 THE COURT: Or we let that jury go for the  
6 cross.

7 MR. CASTELLANO: Possible. So that means  
8 we're going to have at least some preview --  
9 not the entire cross laid out, but some preview about  
10 the subject matter of the cross-examination to decide  
11 whether or not it's for one jury or both juries.

12 THE COURT: Well, can we live on the  
13 witness list, so they can know who to subpoena? Each  
14 defense team will send a letter to the Government  
15 saying: Here is our witnesses, and then you'll  
16 respond by saying -- you can do it either way, you  
17 don't need subpoenas with these people or you do need  
18 them? And if you say no subpoenas for those people,  
19 the rule will be that we won't enforce the American  
20 Rule for those witnesses, and they get their  
21 cross-examination done and get the witnesses out of  
22 here. And if you say they do need a subpoena, that  
23 will mean, if you want to at the time, you can insist  
24 on the American Rule, and they'll have to re-call  
25 them in their case-in-chief?

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1                   MR. CASTELLANO: It's all kind of abstract  
2 right now. I think it's worth a try to do that. I  
3 think they know who our witnesses are for the most  
4 part. But if we think we're not calling someone on  
5 our witness list, and they want that person, then  
6 that's when they need to issue subpoenas. And for  
7 law enforcement witnesses, they also need Touhy  
8 letters and subpoenas.

9                   THE COURT: Okay. Well, can you live with  
10 that?

11                  MS. BHALLA: I think so, Your Honor. And I  
12 don't think it's going to be that many witnesses. I  
13 really don't. And I don't think that it's going to  
14 necessarily be that far outside. I don't really  
15 think -- honestly, when I think about it, I don't  
16 know that it's necessarily going to be outside the  
17 scope of the direct. But --

18                  THE COURT: I think that's what Mr.  
19 Castellano was saying. It may not be that big of a  
20 problem.

21                  MS. BHALLA: Right.

22                  THE COURT: Because I have a fairly large  
23 strike zone anyway on the American Rule. So as long  
24 as it's got something tied to it, I'll probably allow  
25 it.

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1 MS. BHALLA: Okay. Thank you, Your Honor.

2 THE COURT: Anyone else on witnesses, which  
3 is the motion that's on the table? Ms. Armijo?

4 MS. ARMIJO: I do. One of our -- well, two  
5 of our witnesses are victims in this case. And I'm  
6 wondering what the Court's position is on the  
7 victim's -- crime victim's rights, the act of 2004,  
8 which allows them to attend court proceedings? Is  
9 the Court going to require them -- and the witnesses  
10 that we're talking about victims is Gregg Marcantel  
11 and Dwayne Santistevan -- is the Court going to  
12 require them to stay out until they testify? Or is  
13 the Victim's Rights Act of 2004 enough for the Court  
14 to allow them to, for instance, hear opening  
15 statements, or if they want to watch part of the  
16 trial, be in part of the trial?

17 THE COURT: Any thoughts on that, Mr.  
18 Lowry?

19 MR. LOWRY: Yes, I do, Your Honor. I've  
20 looked at this issue before, and I've briefed it.  
21 And the Court has the authority under the rules of  
22 evidence to dictate the order of witnesses at the  
23 trial. If either of the victims want to attend the  
24 trial, rather than break the rule of attendance, the  
25 Court can say if they want to attend the trial, you

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1 need to call them first, so their testimony gets out  
2 of the way. And so, if Mr. Santistevan or Mr.  
3 Marcantel want to sit through the trial and watch the  
4 trial, then the Government would have to call them  
5 first. It's just that plain and simple.

6 THE COURT: I mean, are they -- are they  
7 planning to be here the whole time?

8 MS. ARMIJO: One of them, I know will not  
9 be. Mr. Santistevan, I don't believe he will be  
10 here. But I know --

11 THE COURT: Could you live with this: That  
12 when they show up, they don't sit in the jury room --  
13 in the courtroom until they're called? And then  
14 after y'all work them in, then we'll excuse them and  
15 they can remain?

16 MS. ARMIJO: Well, if that's the Court's  
17 ruling. I mean, we came up with an order of  
18 witnesses, and that's not our preference. But if  
19 that's the Court's ruling, then we will do that.

20 THE COURT: Well, I'm shooting from the  
21 hip. I've had some similar stuff, but not this exact  
22 question. Let's make it the ruling for the time  
23 being, if somebody wants to submit something to me to  
24 tell me that I'm doing it wrong, I'll be glad to take  
25 a look at it.

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1 MS. ARMIJO: What about opening statements?

2 THE COURT: Opening statements, all fact  
3 witnesses need to remain outside of the courtroom,  
4 both sides.

5 All right. Let's see anything else on  
6 witnesses? All right. So I'm going to put this  
7 witness material back in.

8 All right. The next issue I have up -- and  
9 if somebody is watching the clock, and wants to do  
10 something else, I think we better break at 5:15. So  
11 we've got about 30 minutes. Does anybody want to do  
12 anything before we go to objections to jury  
13 instructions?

14 MR. LOWRY: Yes, Your Honor.

15 MR. VILLA: Your Honor --

16 THE COURT: Was that you, Mr. Maynard, or  
17 Mr. Villa?

18 MR. VILLA: I think Mr. Lowry said yes,  
19 Your Honor. But I think what I have might be  
20 slightly less substantive than what he has. But can  
21 I confer with Mr. Lowry?

22 THE COURT: Sure. Mr. Beck?

23 MR. BECK: Your Honor, while you're doing  
24 that, the Court asked for an update on the promises  
25 and benefits information. The United States -- all

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1 the law enforcement officers who were sitting in on  
2 the debriefs and discussions with cooperators were  
3 contacted, and they have all reported that they did  
4 not threaten or induce any cooperation by threatening  
5 other family members. So what we talked about  
6 earlier today, there won't be any update from that.  
7 I'm just putting that on the record so we don't have  
8 to disclose that later.

9 THE COURT: All right. Mr. Villa?

10 MR. VILLA: Mr. Lowry has got it.

11 THE COURT: All right. Mr. Lowry.

12 MR. LOWRY: After conferring with Mr.  
13 Villa --

14 THE COURT: Hold on just a second.

15 Okay. So you're going to ask me to take up  
16 1701?

17 MR. LOWRY: Yes, Your Honor.

18 THE COURT: All right. Just so there is no  
19 confusion, we're still going to have 18 jurors on the  
20 second trial. Everybody gets three peremptory  
21 challenges, each side, to the alternates. Same  
22 number. So nothing changed on the jury. So I think  
23 those are the mechanics.

24 All right. Mr. Lowry, if you want to  
25 discuss 1701. You may have to educate me a little

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1 more on this one, because it's been in my stack  
2 today, but I haven't been able to get to it other  
3 than look at the title.

4 MR. LOWRY: I appreciate that, Your Honor.  
5 And I can do that very briefly.

6 Your Honor -- and the reason this was just  
7 filed yesterday is we discussed at the last hearing,  
8 and as the Court knows well, there was this huge  
9 volume of telephone calls that was released to the  
10 defense teams in December, late -- well mid November,  
11 December. And we've been culling through the 16,000  
12 hours' worth of telephone calls.

13 And in the process of doing that, we  
14 mentioned one -- at the very last hearing, I think,  
15 on December 10th, about Mr. Cordova. And we've  
16 identified three separate government witnesses who  
17 have made phone calls out to their family members,  
18 either their wives, mothers, talking about how it  
19 came to be that they cooperated with the United  
20 States Government.

21 And the substance of those are set out in  
22 the motion on page 3 for Mr. Clark. But Mr. Clark  
23 talks about -- he's talking to his mother, and he's  
24 telling his mother, essentially, that if he didn't  
25 cooperate, that they were going to charge her, and

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1 his -- I don't know if it's his wife or his  
2 girlfriend, but let me just say his significant  
3 other. And the recording goes through that. And  
4 he's explaining to her why he did what he did. And  
5 at the end of the conversation he says, "I ain't  
6 gonna let you guys fall for my bullshit," meaning  
7 that he wasn't going to let them get prosecuted for  
8 involving them in the three-way calls, and things  
9 like that, that would have put them at risk of  
10 prosecution for aiding and abetting, or part of a  
11 conspiracy to distribute drugs, or what have you. So  
12 Mr. Clark is telling his mother, Look, I had to do  
13 what I did because of the pressure that was put on me  
14 by federal agents. Otherwise, you and my wife would  
15 be prosecuted.

16 Now, the same thing goes to the next  
17 defendant, if you look at Billy Cordova. And on  
18 September 4, 2016, Billy Cordova calls his  
19 significant other, Crystal. And Mr. Cordova tells  
20 her during the course of a conversation, "And then  
21 the fucking feds come in and they say, 'Look, we're  
22 going to fucking tax your wife, we're going to tax  
23 your fucking mom. This is what we have on you.'  
24 Boom, they slap a file on me. And I'm like, What,  
25 and I'm like, they're coming after everybody."

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1                   And then he asks his wife, "What would my  
2 daughter do right now, babe," implying that what  
3 would his daughter do if he didn't have her mother or  
4 her grandmother to take care of her. In that  
5 context, Mr. Cordova is telling her, Look, you should  
6 appreciate the sacrifice I made for you.

7                   Then we move on to Lupe Urquizo. And on  
8 March 12, 2017, Lupe Urquizo was in a call with his  
9 brother, Daniel. And they're talking about the same  
10 thing. This is March -- I believe if you look at the  
11 FBI 302s, the first contact we can see in the  
12 discovery is on February 24th of 2017, with Mr.  
13 Urquizo. In this conversation he's talking to his  
14 brother about being visited by federal agents. And  
15 he tells his brother point-blank -- they're talking  
16 about different apparently criminal activity that  
17 they had been involved in. And he says, "They came  
18 to see me about two months ago, and they're asking me  
19 about you. No, I told him. Sheesh, why are you  
20 asking about Daniel," his brother.

21                   And then his brother asks him after some  
22 back and forth, "But did you tell them not to fuck  
23 with me, or what?"

24                   And then Lupe Urquizo tells his brother,  
25 "Fuck, yeah, I told them."

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1                   And then this is the block quote. "Then  
2 they told me, they were asking me, 'How much time  
3 does Daniel still have?' And I told them I believe  
4 he still had some years left and all that, you see.  
5 I told them, 'Well, you know, if I do all that, I  
6 want to make sure my bro is all good, too, and all  
7 that, you see.'

8                   "And they said to me, 'Yeah, as long as  
9 you're truthful and all that, we'll fucking take --  
10 we'll take care of everything.'" Meaning that he  
11 didn't have to worry about his brother being  
12 prosecuted if Mr. Urquizo would cooperate.

13                  Now, we've identified a few other calls,  
14 but involving the three witnesses corroborating the  
15 same theory, the same pattern, where they're saying,  
16 Look, we chose to cooperate so our family members  
17 wouldn't be prosecuted. And really, the essence of  
18 this motion is, and the reason I filed it as a motion  
19 to strike, Your Honor, is you've heard us -- I  
20 believe at the last set of hearings, I raised an  
21 issue on behalf of Ms. Sirignano on a motion to  
22 compel the Brady and discovery. I had filed a motion  
23 to compel Brady and discovery. And Your Honor said,  
24 Well, it sounds like you're complaining, Mr. Lowry.  
25 And I believe at the time I said, Yeah, I am

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1 complaining. And I was.

2 But we got the Jencks Act disclosures on  
3 the 12th of January. And may I use the Elmo? And,  
4 unfortunately, the Jencks Act disclosures were  
5 essentially Brady and Giglio disclosures. Because  
6 the vast majority, in my view, as a defense attorney,  
7 were impeachment evidence that the defense could use.

8 And just, for instance, I'm looking at --  
9 and Your Honor knows, we've been asking for the field  
10 notes, the rough notes, from the FBI for -- since the  
11 very first hearing we had in front of the Court. And  
12 I'm looking at a document that's a DeLeon Bates No.  
13 42976, and it's the field notes of an FBI agent, and  
14 they're dated December 17, 2015.

15 THE COURT: Ms. Standridge, I need some  
16 screen, either put that one on, or --

17 MR. LOWRY: And the reason I bring this up,  
18 Your Honor, about the Brady information is because  
19 Your Honor had a very detailed and specific colloquy  
20 with the parties in 2016 about your view of Brady.  
21 And you told the United States, Look, I think if  
22 you're doing a Brady review, you can't use a computer  
23 algorithm. You need to get a real human, and not the  
24 case agent, not an FBI official. You need to have an  
25 attorney from the United States Attorney's Office lay

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1       eyes on this evidence, and examine it and screen it  
2       as if you were a defense attorney.

3                  And why I bring up this particular set of  
4       field notes, while we're trying to get the Elmo up,  
5       is that on DeLeon Bates No. 42981, it's discussing  
6       the agent who is interviewing Roy Paul Martinez, asks  
7       him about the Marcantel hit. And the very first note  
8       under the heading Marcantel hit says, "'Crazo'  
9       approached 'Shadow' saying Santi need hit," meaning  
10      that "Crazo," Eric Duran, approached Roy Paul  
11      Martinez, and explained to Mr. Roy Paul Martinez that  
12      Dwayne Santistevan needed to be murdered.

13                 Now, we've been before for you some time  
14       saying that Mr. Duran was the moving force behind the  
15       Marcantel-Santistevan allegations. And here you have  
16       a document that was created in December 2015, the  
17       Government concealed until January 12, 2018. Now,  
18       why they sat on it for that long, I don't know. The  
19       Government -- Your Honor, instructed them in October  
20       and November 2016 how to do a Brady review. And here  
21       we are on the eve of trial. And the reason I bring  
22       this up and styled this as a motion to strike, Your  
23       Honor, is because this has been a systematic and  
24       uniform effort to undermine the ability of the  
25       defense to present a meaningful and effective case.

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1                   And there is no reason -- because the  
2 Court, in I believe in Document 907 -- I can't  
3 remember the filing date right offhand, Your Honor,  
4 but I think it was in April of 2017 -- said that the  
5 Brady and Giglio disclosures had to be done  
6 immediately. And in October you gave them a 14-day  
7 window to do the review.

8                   So I'm a little disappointed -- more than  
9 disappointed -- that here we are on the eve of trial,  
10 and what we predicted happened, happened. We got all  
11 the Brady and Giglio materials that were supposed to  
12 have been disclosed throughout the case at the last  
13 minute. And here we are scrambling to follow up.

14                  Just another example that was disclosed in  
15 the Brady-Giglio material, Lupe Urquiza tells -- and  
16 so this -- it's still booting up.

17                  May I approach, Your Honor?

18                  THE COURT: You may.

19                  MS. ARMIJO: Can we get the Bates stamp  
20 numbers?

21                  MR. LOWRY: Your Honor has it.

22                  THE COURT: It's 42981.

23                  MR. LOWRY: I've highlighted the relevant  
24 portion there, Your Honor.

25                  If you go in and look through the, quote,

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1 Jencks disclosures that were provided on --

2 THE COURT: Let me give all the numbers to  
3 Ms. Armijo. 42981, 42982, 42976, 42977, 42978,  
4 42979, and 42980.

5 MR. LOWRY: And Your Honor, I'd like to  
6 tender that as Anthony Baca's Exhibit A for the  
7 purpose of this hearing.

8 THE COURT: All right. Any objection, Ms.  
9 Armijo?

10 MS. ARMIJO: No objection.

11 THE COURT: Anyone else? All right. Then  
12 Anthony Baca Exhibit A to this hearing will be  
13 admitted into evidence.

14 MR. LOWRY: So, Your Honor, I mean, I think  
15 it's fairly obvious from looking at that, that that  
16 was a defense friendly impeachment. And in fact,  
17 more than impeachment, that is exculpatory; that it's  
18 Eric Duran wanting Dwayne Santistevan hit. And at  
19 that time he's operating as an agent of the United  
20 States Government. And so there is really no excuse  
21 for not having that, not disclosing that earlier.  
22 And there is really no excuse to call that Jencks Act  
23 material.

24 Now, if we go through -- and I don't have  
25 all day, because we're at the end of the day -- but

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1 there are plenty of examples like this in the  
2 allegedly Jencks Act material. And another example  
3 is Lupe Urquiza in a 302 says that after Julian  
4 Romero was assaulted, he makes a call. He doesn't  
5 call Mr. Baca. He doesn't try to write a letter to  
6 Mr. Baca. He calls Gerald Archuleta, and explains to  
7 Gerald Archuleta, Hey, we finally did the Julian  
8 Romero takedown. And according to the FBI 302, Lupe  
9 Urquiza gets disillusioned because Gerald Archuleta  
10 is exceedingly disappointed, and, in fact, upset with  
11 him because he wanted Julian Romero murdered, not  
12 just beaten up.

13 And again, what you see is evidence that  
14 the hit is the responsibility of Gerald Archuleta,  
15 another cooperating witness for the United States,  
16 and not Mr. Baca. So given the scope of the problem,  
17 and given the depth of the problem -- and by the way,  
18 that call that Mr. Urquiza references has never been  
19 disclosed. We've looked for it in the disclosures.  
20 But we don't have a copy of it at all.

21 So here we are on the eve of trial, and  
22 exactly what I predicted was going to happen, we have  
23 to do a massive investigatory effort to look at this  
24 material, and follow up on it.

25 And I know Your Honor doesn't want to

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1 postpone this trial. So if you don't want to  
2 postpone the trial, so we can have an effective  
3 defense, then the only remedy left is to strike these  
4 witnesses. And I think it's a fair and adequate  
5 remedy. And I think it's well within this Court's  
6 authority to do.

7 And I think, if you look even just recently  
8 in the news, the Cliven Bundy matter, the judge in  
9 that case had to dismiss that criminal prosecution  
10 because of the Brady violations in that case. And I  
11 know this is a drastic remedy, but given the  
12 circumstances here, we're on the eve of trial, and  
13 we're trying to still sort out thousands of hours of  
14 telephone calls that have exculpatory information.

15 My concern here, Your Honor, is we're, you  
16 know, heading into trial -- and I think we'll  
17 probably get through a trial -- but I think at the  
18 end of the trial, we're going to find that there has  
19 been significant Brady violations in this case, and  
20 we'll all be looking at a do-over down the line. And  
21 nobody needs that. I mean, I don't mind trying the  
22 case once. But I don't want to try it twice.

23 Your Honor, the United States, if I  
24 understand their position correctly, is that, Okay,  
25 you have these calls, but this is all hogwash, and

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1 these calls are all lies. And I think that's the  
2 position of the United States.

3                   But I'm not quite so sure that's the case.  
4 And the reason I say that is one of the Lupe Urquizo  
5 calls -- and I have it queued up if you want to  
6 listen to it -- but Mr. Urquizo is talking about all  
7 the benefits he's going to get in exchange for his  
8 cooperation. And he says, Look, they're going to  
9 charge me. But once these trials are over, I'm only  
10 going to have to serve a few years, like one to  
11 three. And they're going to let me out. And they're  
12 going to get me a house, and they're going to do  
13 this, and get me a job, and do all these grand  
14 things. And in the context of one of these calls  
15 he's talking about his girlfriend getting traffic  
16 tickets. And he says very clearly, Don't worry,  
17 don't worry about that because the people I'm working  
18 with, they're going to take care of that for us.  
19 They've told me that they'll fix these tickets for  
20 us. And again, I need an investigator to go find out  
21 whether this individual actually had tickets and  
22 whether they were dropped.

23                   But what I can tell you is that we know  
24 that that happened. And here's how we know that:  
25 Just after his release from incarceration, Eric Duran

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1 was driving north of Santa Fe, and he got pulled over  
2 and he got traffic tickets. And they're minor,  
3 they're really petty: No driver's license, expired  
4 registration of a motor vehicle. Frankly, Your  
5 Honor, I've been there, I've done that, you know.  
6 And what's interesting about this, Your Honor -- I'd  
7 lining to tender this as Anthony Baca Exhibit B --  
8 the interesting thing about this -- may it be  
9 admitted, Your Honor?

10 THE COURT: Any objection, Ms. Armijo?

11 MR. BECK: No, Your Honor. No objection.

12 THE COURT: Anthony Baca Defendant's  
13 Exhibit B will be admitted into evidence.

14 MR. LOWRY: But what is really interesting  
15 about this is how these really petty traffic tickets  
16 disappeared. They disappear on a nolle prosequi  
17 signed by a prosecutor out of the County of Rio  
18 Arriba. Now, I've practiced criminal defense for  
19 almost 20 years. And I have never, ever seen a  
20 prosecutor file a nolle, a notice of dismissal, on a  
21 minor traffic ticket. Ever.

22 And so this makes me think that this  
23 chatter we're hearing on these phone calls, this  
24 isn't idle chatter, these aren't lies. This really  
25 happened. And the kicker, Your Honor, is this

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1 dismissal of a traffic ticket isn't on the notice of  
2 benefits we got on January 17th of 2018, from the  
3 United States Government. And Your Honor, this is a  
4 confidential document, so I'm not going to put it up  
5 on the Elmo. But I would like to tender it, under  
6 seal, as Anthony Baca's Exhibit D -- after Anthony  
7 Baca's Exhibit C. May I move for the admission?

8 THE COURT: Are you skipping C?

9 MR. LOWRY: Pardon me. I think I  
10 skipped -- well, A is the handwritten notes; B is the  
11 actual ticket, and the notice is C. So D would be --

12 THE COURT: Any objection to C, Mr. Beck?

13 MR. BECK: No, Your Honor.

14 THE COURT: All right. Defendant's Anthony  
15 Baca Exhibit C will be admitted into evidence. And  
16 now you're doing D?

17 MR. LOWRY: Yes, Your Honor.

18 THE COURT: Any objection?

19 MR. BECK: Is this the sealed --

20 MR. LOWRY: D would be the sealed.

21 MR. BECK: No objection to D sealed.

22 THE COURT: Not hearing any objection,  
23 Anthony Baca's Exhibit D will be admitted into  
24 evidence.

25 MR. LOWRY: So Your Honor, I mean, it's

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1 very convenient for the United States to say, Judge,  
2 don't worry about this. This is all lies. But I'm  
3 not so sure that that's the case. And I'm not so  
4 sure we can sit down and come to that conclusion  
5 without actually listening or calling in Mr. Urquizo,  
6 Mr. Cordova, and Mr. Clark to really tell us about  
7 what transpired. Because you can say they're all  
8 lying. But they had a unique quality to the pattern  
9 of being confronted with evidence, with being  
10 confronted with how their family members were going  
11 to be prosecuted, and given a period of time to think  
12 about what their next move was going to be. And then  
13 they called their family members and say, Here's what  
14 happened, and here's how I got pinched.

15 And Your Honor, I just don't think it's a  
16 trivial matter. And I'm mindful of one of the  
17 Court's admonitions -- I think it was in the  
18 beginning of November, when we started the hearings,  
19 it's like, Look, we're going to have a trial on  
20 January 29. And if we don't have your motions heard,  
21 I'm going to deem them denied. And I don't think  
22 this is the kind of motion we can just deem denied  
23 because of the timeliness. Because the timeliness is  
24 not the fault of the defendants.

25 Your Honor, we have been complaining about

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1       this for some time. You have instructed the United  
2       States how to review Brady and Giglio information.  
3       And, Your Honor, they know how to review Brady and  
4       Giglio information. And this is Brady and Giglio  
5       information. And there is absolutely no compelling  
6       reason why this was disclosed on January 12th of  
7       2018, and not sometime during the year of 2016 or  
8       2017.

9                   So, Your Honor, in light of the egregious  
10      violations of this Court's orders, I would move to  
11      strike Benjamin Clark, Billy Cordova, and Lupe  
12      Urquiza as witnesses in this case.

13                  Or in the alternative, we can have an  
14      evidentiary hearing to see what the actual  
15      individuals say about the pressure that was put on  
16      them, and not take the representations of counsel.

17                  THE COURT: All right. Thank you, Mr.  
18      Lowry.

19                  Any other defendant want to say anything on  
20      this? Mr. Villa?

21                  MR. VILLA: Judge, I want to just speak to  
22      the disclosure of Jencks and echo what Mr. Lowry  
23      said. We've joined his motion. Mr. Castle filed  
24      this motion, this Document 1693, related to Trial 2.  
25      It's a motion for immediate production of all the

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1 remaining materials in the Government's possession  
2 regarding Trial 2 witnesses. And he filed it  
3 because, as we reviewed the Jencks material, we  
4 thought: This isn't Jencks, this is Giglio. This is  
5 Brady. This is stuff that should have been disclosed  
6 when the Court ordered it disclosed, back in May.  
7 And by way of example, attached to Mr. Castle's  
8 motion is Document 1693-1 which I'd ask the Court to  
9 consider as evidence to this motion. This is a 302  
10 from July 12, 2016 of Billy Cordova. It's disclosed  
11 January 12th with the Jencks material.

12 If you look -- Mr. Castle highlighted it --  
13 it discusses the murder of an unknown Los Carnales  
14 Gang member. And what this goes on is Mr. Cordova's  
15 role in murdering this individual in the streets of  
16 Albuquerque, and dumping his body. And as you heard  
17 from Agent Acee and Mr. Cordova, one of the benefits  
18 that Mr. Cordova received was he didn't get  
19 prosecuted in the RICO case. Agent Acee specifically  
20 testified -- and the Court can take notice of that  
21 for its decision here -- that he told Agent Neale to  
22 stop writing overt acts on Mr. Cordova because Mr.  
23 Cordova was going to cooperate. And that was one of  
24 the benefits Mr. Cordova received.

25 Well, this is information that Agent Acee

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1 and his team learned that Mr. Cordova did on behalf  
2 of the SNM. It goes into detail about how they're  
3 told to kill this Los Carnales Gang member because  
4 he's Los Carnales, and they're SNM, and that's what  
5 they do allegedly. And Mr. Cordova is proceeding to  
6 describe how he did it, and how he dumped the body in  
7 San Jose, in Albuquerque. And this wasn't disclosed  
8 until January 12.

9                 This is isn't Jencks, Judge. This is  
10 Brady. This is Giglio. And the Government knew  
11 about it not just recently, but according to this  
12 document, in July of 2016. So I think on the  
13 discovery violation alone, you could strike Billy  
14 Cordova's testimony as the appropriate remedy now  
15 that we're on the eve of trial, before you ever have  
16 to get into the coercion part. This document -- and  
17 Mr. Castle refers to another one in here, which the  
18 Court can look at -- are just one example of many,  
19 when you review this Jencks material. It isn't  
20 Jencks. It's Giglio. It's Brady. And it should  
21 have been produced as soon as these reports were  
22 available.

23                 THE COURT: All right. Thank you, Mr.  
24 Villa.

25                 Any other defendant have anything to say on

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1 this motion?

2 All right. Mr. Beck?

3 So you dropped the bow tie for trial, and  
4 going with a bolo tie?

5 MR. BECK: Yeah, just today.

6 THE COURT: That surprises me, Mr. Beck.

7 There is a leap, you know; just go with a straight  
8 tie.

9 MR. BECK: From the bow tie to the bolo  
10 tie. I figured I'd try it out today.

11 THE COURT: What do you think at the end of  
12 the day?

13 MR. BECK: You know, it's feeling pretty  
14 comfortable. This was my great uncle's, this was  
15 his.

16 THE COURT: Some juries don't like bolo  
17 ties.

18 MR. BECK: I guess I'll add that to my voir  
19 dire.

20 THE COURT: They don't like bow ties  
21 either. And they don't like beards.

22 MR. BECK: I have heard that before. I  
23 have heard that.

24 Your Honor, I will start with Exhibit C  
25 from the motion to strike. This is the call in which

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1       a person talks to his brother, Daniel, about what  
2       they were going to do to him. Mr. Urquizo does not  
3       have a brother named Daniel. And it says that the  
4       party calling is Marty, and not Mr. Urquizo.

5           THE COURT: I'll tell you what, given the  
6       time we're here, do you plan on filing a written  
7       response to this?

8           MR. BECK: Sure. We can.

9           THE COURT: All right. Well, you've heard  
10      the arguments today, and you've seen the brief. Why  
11      don't you file a response and take a look at it?

12           All right. We need to bring it to an end.  
13      There is an issue that Ms. Wild was out of the room  
14      on as far as exhibits. So I might suggest that Ms.  
15      Jacks, maybe you and Mr. Beck can come up and talk a  
16      little bit about the -- Ms. Wild wants to talk to  
17      each trial team. So if y'all come up after it's over  
18      and talk to her. And Ms. Wild, the topic that we  
19      need to discuss is going to be how we number  
20      exhibits. Do we want one set of exhibits? Do we  
21      want one for each jury? I think the Government  
22      thinks there should just be one. The defendants are  
23      leaning toward separate ones. But if you'll add that  
24      to the list.

25           All right. I appreciate everybody's hard

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1 work. We'll see you at 8:30 on Monday morning, and  
2 look forward to working with you.

3 (The Court was adjourned.)

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1 C-E-R-T-I-F-I-C-A-T-E  
2  
3 UNITED STATES OF AMERICA  
4 DISTRICT OF NEW MEXICO  
5  
6  
7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
8 Official Court Reporter for the State of New Mexico,  
9 do hereby certify that the foregoing pages constitute  
10 a true transcript of proceedings had before the said  
11 Court, held in the District of New Mexico, in the  
12 matter therein stated.

13 In testimony whereof, I have hereunto set my  
14 hand on February 2, 2018.

15  
16  
17  
18 *J. Bean*  
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